Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER, 1979

No. 79-1898

ROBERT J. L'HOSTE, ET AL,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

ROBERT J. L'HOSTE, R. J. L'HOSTE AND COMPANY, INC., CLARENCE EUGENE ROGERS AND MARVIN COCHRAN
Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Robert J. L'Hoste, R. J. L'Hoste and Company, Inc., Clarence Eugene Rogers and Marvin Cochran, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States court of Appeals for the Fifth Circuit rendered in these proceedings on January 10th, 1980, rehearing denied April 14, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *United States v. L'Hoste, et al*, 609 F.2d 796 (5th Cir. 1980). That opinion appears at Appendix A, *infra*. The denial of the petition for rehearing and rehearing en banc was denied on April 14, 1980, and has not yet been officially reported, but the slip opinion appears at Appendix B, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 10, 1980. The judgment of denial of the petition for rehearing and rehearing en banc was entered on April 14, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Does Rule 7(c)(1) of the Federal Rules of Criminal Procedure requiring that an indictment be a "plain, concise and definite written statement" of the essential facts constituting the alleged offense add requirements to an indictment more restrictive than the minimal Constitutional requirements as set forth by this Court; and if so, did the indictment in the present case violate the provisions of Rule 7(c)(1)?

2. Was the Court's ruling in the present case to the effect that the defendants were not entitled to a jury instruction distinguishing between unlawful bribery and "goodwill expenditures" in conflict with the Fourth Circuit cases of *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976) and *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979)?

3. Was the Fifth Circuit's ruling in this case to the effect that the forfeiture provisions of 18 USC §1963(a) are mandatory rather than discretionary, in concert with the Second Circuit case *United States v. Huber*, 603 F.2d 387 (2nd Cir. 1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the Government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary violation of the statute, rule, regulation, or other provision of law which the defendant as alleged therein to have violated. *Federal Rules of Criminal Procedure*, Rule 7(c)(1).

2. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the militia, when actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. United States Constitution, Amendment 5.

3. **§ 1963. Criminal penalties**

(a) Whoever violates any provision of section 1962 of this

chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

STATEMENT OF THE CASE

On December 1, 1977, defendants were charged in a forty page indictment with conspiracy to violate various Federal and State laws in violation of Title 18 USC 371 and a substantive violation of the Rico Statute, Title 18 USC §1962. Various pre-trial motions were filed, including a motion to dismiss the indictment, based on over-breadth and vagueness, in violation of Rule 7(c)(1) of the Federal Rules of Criminal Procedure. Prior to the hearing of this motion, however, the Government filed a superseding indictment charging the same violations of federal law. Defendants renewed their motion to dismiss the new indictment, which motion was denied, and the case went to trial on March 13, 1978. Defendants were subsequently convicted on both counts of the indictment. However, this conviction was overturned by the trial court stating *inter alia*, that the indictment was too broad, complex and impossible to defend against. See Appendix C.

On June 6, 1978, the Government filed a second superseding indictment with even broader allegations and language than the previous one which was allotted to a different judge. See Appendix D. Defendants again moved to dismiss the indictment on the grounds that it violated the mandate of Rule 7(c)(1) that an indictment be a "plain, concise and definite" statement. This motion was subsequently denied. Defendants sought relief by filing a petition for writ of mandamus with the Fifth Circuit Court of Appeals, which was denied on July 17, 1978. A second trial was commenced on July 24, 1978. However, during the course of this trial, both counsel and the court became aware of the decision of the Fifth Circuit Court of Appeals in *United States v. James*, 576f.2d 1131 (5th Cir. 1978), which lead to a mistrial on July 28, 1978. A new trial began three days later which resulted in a guilty verdict on both counts as to all defendants.

Defendants subsequently filed an appeal with the Fifth Circuit Court of Appeals (No. 78-5593) seeking to have their convictions overturned on various grounds including the overbreadth of the indictment. The Government filed writs regarding the refusal of the tiral court to invoke the forfeiture provisions of 18 USC §1963 and the two matters were consolidated. Subsequently, on January 10, 1980, a three judge panel consisting of Judges Tjoflat, Vance and Allgood rendered a decision affirming defendants convictions and granting the Government's request for a Writ of Mandamus to require the trial judge to invoke the forfeiture provisions.

Defendants then applied for a rehearing and a rehearing en banc, which was denied on April 8, 1980, with four judges dissenting from the denial of the rehearing en banc.

STATEMENT OF FACTS

The gist of the charges against the defendants, is that they participated in a scheme whereby their company (R. J. L'Hoste and Company, Inc.) would receive emergency sewer repair jobs in exchange for "kickbacks" paid to certain local government officials. These alleged kickbacks took the form of vacations, free lunches, campaign contributions, and equipment rentals. The time frame of the alleged scheme spans an eight year period beginning on or about April 23, 1970, through December 1, 1977. (Appendix D.)

During the course of the trial, the defense admitted providing some local officials with free lunches, vacation trips, etc. The only thing at issue therefore was the equipment rental scheme. In order to prove this alleged conspiracy, the Government relied solely on the testimony of two witnesses, Fred Hoth and Carl Calamia. Each of these witnesses were given immunity in exchange for their testimony.

Petitioners maintained throughout the trial and throughout the post trial proceedings, and continued to maintain, that the testimony of each of these two witnesses was filled with lies and contradictions and was completely discredited. Therefore, the evidence relating to the lunches, trips, etc. was critical during the trial. The Government contended throughout the trial that the giving of these favors constituted bribery. Petitioners, on the other hand, maintained that they were merely legitimate business expenditures designed to create goodwill with their customers. A complete understanding of the difference between bribery and goodwill expenditures was, therefore, crucial to the jury. The trial court, however, did not instruct the jury in this regard.

During the sentencing phase of the proceedings, the trial court indicated that it believed the forfeiture provisions of the RICO Statute (18 U.S.C. §1963) were discretionary, rather than mandatory. He, therefore, refused to invoke the provisions against petitioners. The Government then sought supervisory writs from the Fifth Circuit Court of Appeals on the grounds that the provisions of §1963 were mandatory and that the trial judge had no discretion in the matter. Subsequently, the Fifth Circuit agreed with the Government and ordered the trial court to invoke the forfeiture provisions.

REASONS FOR GRANTING THE WRIT

1. The language of Rule 7(c)(1) of the Federal Rules of Criminal Procedure requiring that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged" has never been interpreted by this or any other appellate court. Although often cited, the legal requirements of the terms "plain, concise, and definite" have never been enunciated. It is, therefore, imperative for a defendant to know whether this rule actually means what it says or is just a superfluous repetition of the minimal constitutional standards.

2. The decision of the Fifth Circuit in this case, is in direct conflict with the decision of the Fourth Circuit in the cases of *United States v. Arthur*, 544 F.2d 730 (4th Cir., 1976) and *United States v. Mandel*, 591 F.2d 1347 (4th Cir., 1979).

3. The Fifth Circuit ruled in this case that the forfeiture provisions of 18 U.S.C. §1963(a) were mandatory and that the trial judge had no discretion as to whether they should be applied to any given defendant. Petitioners maintain that, with the increasing use of the RICO Statute by the Government, this question is one which will be raised again and again and should be decided by this Court. Additionally, the Fifth Circuit's resolution of this matter, is in conflict with the decision of the Second Circuit in the case of *Unted States v. Huber*, 603 F.2d 387 (2nd Cir., 1979).

ARGUMENT

1. DOES RULE 7(c)(1) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE REQUIRING THAT AN INDICTMENT BE A "PLAIN, CONCISE AND DEFINITE WRITTEN STATEMENT" OF THE ESSENTIAL FACTS CONSTITUTING THE ALLEGED DEFENSE PUT A HIGHER STANDARD ON THE DRAFTING OF AN INDICTMENT THAN DO THE CONSTITUTIONAL REQUIREMENTS AS SET FORTH BY THIS COURT; AND IF SO, DID THE INDICTMENT IN THE PRESENT CASE VIOLATE THAT STANDARD?

Throughout all of the proceedings below, including both the trial and appellate levels, petitioners have complained that the indictment in the present case did not comport with the requirements of Rule 7(c)(1) of the Federal Rules of Criminal Procedure that an indictment be a "plain, concise and definite written statement of the essential facts constituting the alleged offense". Each time the point was raised, the presiding judge or

judges would review the indictment in light of the constitutional requirements that it fairly inform the defendant of the charge or charges against him and enable him to plead an acquittal or conviction in bar to any future prosecution for the same offense. The following language from the Fifth Circuit's opinion in this case is indicative of how virtually all the Courts have handled this argument:

> We are also convinced that the indictment does not transgress Rule 7(c)(1). The allegations clearly put the defendants on notice of the offenses charged, advised them of the facts giving rise to those offense, and furnished an adequate foundation for a plea of double jeopardy in the event of a future prosecution of the defendant for the same conduct. *United States v. L'Hoste*, 609 F.2d 796, 801 (5th Cir., 1980).

As can be seen, no mention is made of the requirement that the indictment be "plain, concise and definite".

This argument is not merely one of semantics. Petitioners maintain that the requirements of Rule 7(c)(1) are different from and in addition to, the minimal constitutional standards as set forth by this Court. Yet, no court has ever addressed this argument directly.[1]

The traditional attacks against the vagueness and overbreadth of an indictment stem from the fact that they gave so little information that the defendant was unable to prepare his defense and/or protect against double jeopardy, e.g. *Hamling v. United States*, 418 U.S. 87 (1974) and *Russell v. United States*,

1 Petitioners have shepardized Rule 7(c)(1) and have found no cases which either analyze or interpret its language. To be sure, it has been applied numerous times but almost always in tandem with constitutional standards. E.G. *United States v. Diecidue*, 603 F.2d 535 (5th Cir., 1979). The few cases which do rely on Rule 7(c)(1) exclusively, simply state that the indictment either was or was not plain and concise. No court has ever analyzed the Rule to determine what it requires.

369 U.S. 749 (1962). Those constitutional concepts loosely coincide with the Rule 7(c)(1) requirement that the indictment be plain and definite. Consequently, the Rule traditionally got carried along with the cases analyzing the constitutionality of the indictment. Indeed, that is exactly what happened in the present case. Notwithstanding the petitioners' reliance upon Rule 7(c)(1), the Fifth Circuit started off its analysis by applying the constitutional test of an indictment as enunciated by this Court in *Hamling*, supra. See *United States v. L'Hoste*, supra at 800. This "two prong test" is a constitutional test and does not deal with Rule 7(c)(1).

The traditional argument made by defendants is that the indictment has failed to supply an essential element, and is therefore defective. What about the indictment that does have all of the essential elements, but has alleged so many elements, over such a long period of time, supposedly violating so many statutes, that it defies understanding by the court or the jury. Such an indictment could theoretically meet the "two prong" *Russell-Hamling* test and yet still violate the provisions of Rule 7(c)(1) because it is not plain, concise, and definite.

Petitioners suggest that this type of indictment is a brand new phenomenon that is going right past the courts without any-type of meaningful analysis. This is the age of the so-called "white collar crime". These crimes are not like the bank robberies, kidnappings, drug sales, etc. with which the courts and juries have traditionally dealt. The potential complexity of these types of crimes gives rise to a new type of indictment such as seen in the present case. It does not suffice to say, as the Fifth Circuit did in the present case, that the indictment's "length and complexity (was) necessitated, we think, by the nature of the crimes charged". *United States v. L'Hoste*, supra at 800. The Government's "need" has no legitimate place in the consideration of Rule 7(c)(1). At the risk of being redundant, petitioners point out that the law says that an indictment *must* be plain,

concise and definite. It nowhere says that it can be confused, lengthy and vague if the crime being charged is a complex one.[2]

If this Court or any appellate court had previously analyzed Rule 7(c)(1), independent of the broad constitutional standard which it encompasses, then petitioners would be relegated to an argument that the law was improperly applied in this case. But to the contrary, one of the most basic statutory provisions in our law has never been interpreted by any appellate court. The age of the "white collar crimes" demands that this statute be interpreted so that the district courts, the Government, and defense counsel will be able to properly apply it.

Trained counsel may be able to dissect an indictment so as to prepare a defense and protect the client against double jeopardy, as mandated by the *Russell-Hamling* constitutional requirements, but only Rule 7(c)(1) can protect the defendant against the bewilderment which indictments such as the present one cause to juries. As Judge Jerome Frank said:

> We judges ought to take judicial notice of what every ordinary person knows about juries, and therefore to recognize that twelve citizens, casually summoned to serve as jurors, are not trained fact finders and can be easily bewildered . . . The need for safeguarding defendants from misunderstanding by the jury is particularly acute in conspiracy trials . . . *United States v. Liss*, 137 F.2d 995, 1003 (2nd Cir., 1943), cert. denied, 320 U.S. 773.

2 In making this point petitioners do not in anywise concede that the alleged crime required the complexity and multiplicity of charges set forth in the conspiracy count (and incorporated by reference in the substantive count). There was no legitimate reason for including all of the enumerated crimes within one conspiracy. The Government, the defense, and the Court well know that it is a fiction to believe that the complexity of the crime justifies the inclusion in one conspiracy count alleged violations of 18 U.S.C. §1962, Louisiana Revised Statute 14:118, 18 U.S.C. §1961(1)(a), 18 U.S.C. §1341, and 18 U.S.C. §1952. Assuming that the alleged crime was so complex that the Government felt that all of these statutes were violated, it could have broken them down into separate counts so that each charge would be a plain, concise, definite statement as required by Rule 7(c)(1).

2. WAS THE COURT'S RULING IN THE PRESENT CASE TO THE EFFECT THAT THE DEFENDANTS WERE NOT ENTITLED TO A JURY INSTRUCTION DISTINGUISHING BETWEEN UNLAWFUL BRIBERY AND "GOODWILL EXPENDITURES" IN CONFLICT WITH THE FOURTH CIRCUIT CASES OF *UNITED STATES V. ARTHUR*, 544 F.2d 730 (4th Cir., 1976) AND *UNITED STATES V. MANDEL*, 591 F.2d 1247 (4th Cir., 1979)?

As noted previously, one of the main issues in this case was the distinction between goodwill business expenditures and bribery. This distinction was especially acute in this case because petitioners admitted to buying certain officials free lunches and airline tickets for vacation trips. They maintained throughout, however, that these were legitimate business expenditures designed to create and maintain goodwill among their customers.

Originally, the trial court fashioned a jury instruction based upon the Fourth Circuit case of *United States v. Arthur*, 544 F.2d 730 (4th Cir., 1976) which distinguished between these types of expenditures and bribery. However, upon objection by the Government, the Court refused to use that instruction stating that the Louisiana law on bribery was different from that of West Virginia where the *Arthur* case originated. The trial court also refused to give the instruction requested by petitioners regarding the same issue and based upon the same case. The Fifth Circuit upheld the judge's decision stating, *inter alia*, that:

> While this Court recognizes that all expenditures made by businessmen to public servants are not motivated by the criminal intent necessary for bribery, we cannot fault the district court for failing to articulate the difference between licit and illicit business expenditures in its charge to the jury. *United States v. L'Hoste*, supra at 808.

This reasoning runs directly contra to the Fourth Circuit's decision in *United States v. Arthur*, supra. In that case, the defendant was the president of a federally insured bank in West Virginia and the evidence disclosed that during an approximate three-year period he took part of the bank's money to ". . . entertain, do favors and buy gifts for state and party officials who might be influential in securing government deposits for the bank." *Id.* at 733. The Government maintained that the activity constituted bribery and was, therefore, a misapplication of the bank's funds in violation of 18 U.S.C. §656. The defendant responded that he was not attempting to bribe anyone but rather used the money ". . . for the purpose of creating an maintaining goodwill toward the bank among potential customers and persons who might be influential with potential customers." *Id.* at 733.

The Fourth Circuit reversed because it found the trial court's jury instructions erroneous ". . . in that it failed to adequately distinguish conduct which amounts to bribery from conduct which is legally innocent." *Id.* at 734. The Court noted that:

> It does not follow . . . that the traditional business practice of promoting a favorable business climate by entertaining and doing favors for potential customers becomes bribery merely because the potential customer is the government. Such expenditures, although inspired by greater government business, are not intended as a *quid pro quo* for that business. They are in no way conditioned upon the performance of an official act or pattern of acts or upon the recipient's expressed or implied agreement to act favorably to the donor when necessary. *Id.* at 734.

It cannot be emphasized too strenuously here that this point is important both to the present prosecution and to all federal bribery prosecutions. Why should a defendant in the Fourth Circuit be entitled to an *Arthur* type instruction when a defendant in the Fifth Circuit is not? This point takes on added

significance when viewed in light of the post-Watergate trend towards white collar prosecution. It is therefore, essential that there be uniformity in the application and the prosecution of these types of statutes.

3. WAS THE FIFTH CIRCUIT'S RULING IN THIS CASE TO THE EFFECT THAT THE FORFEITURE PROVISIONS OF 18 U.S.C. §1963(a) ARE MANDATORY RATHER THAN DISCRETIONARY, IN CONFLICT WITH THE SECOND CIRCUIT CASE *UNITED STATES V. HUBER*, 603 F.2d 387 (2nd Cir., 1979)?

The defendents in this case were convicted of the so-called RICO statute, 18 U.S.C. §1962. The jury made a factual determination that the defendant, Robert J. L'Hoste, maintained his two-thirds stock ownership in R. J. L'Hoste & Co., Inc. in violation of Section 1962 and that said ownership afforded him influence over the company. The Government maintained that once the jury had made that determination the forfeiture of the said stock to the Government was mandatory under the provisions of 18 U.S.C. §1963(a). The defense countered that the language of that statute was clear that the Court had discretion and, although it had the right to forfeit, it was not required to do so. The trial court determined that it did have discretion and chose to exercise that discretion by not forfeiting the stock to the Government. The Fifth Circuit, however, reversed the trial court holding that the forfeiture provisions of the RICO statute were mandatory and that the trial court had no discretion in their application.

This question was one of first impression by the Fifth Circuit and has not been decided by any other appellate court. Considering the increased use of the RICO statute by federal prosecutors and the harsh and unusual nature of the forfeiture provisions, petitioners respectfully suggest that this issue is appropriate for consideration by this Court.

It is important to note here that the forfeiture provisions of the RICO statute partially repealed a law which has stood for over one hundred eighty years. That law, 18 U.X.X. §3563, provides that: "No conviction or judgment shall work corruption of blood or forfeiture of estate." See *United States v. Rubin*, 559 F.2d 975 (5th Cir., 1977). Although this Country has always had *in rem* forfietures, it has never allowed, until RICO, *in personam* forfeitures. *United States v. Rubin*, supra. Therefore, the application and interpretation of this statute is extremely important.

This issue becomes even more crucial when viewed in light of the broad provisions of the RICO statute itself. All that is required for conviction under RICO is two violations of enumerated state or federal offenses committed with ten years of each other. 18 U.S.C. §1961(5). As Judge Tate stated in his dissenting opinion in the denial of the rehearing in this case:

> I cannot at the present believe it was the intention of Congress to leave to a prosecutor alone the determination to achieve forfeiture of an accused[15] property by prosecuting him under the Federal Racketeering Statute for what, as statutorily defined with regard to the present case, represents only two or more violations of local bribery statutes or of somewhat esoterically applied federal crimes, themselves punishable by imprisonment or fine, but not by forfeiture. *United States v. L'Hoste*, denial of rehearing en banc, Appendix B.

Judge Tate went on to say that:

> It is well to note, at this time, that no matter how isolated and minor two "racketeering" incidents might be in the context of the entire business conducted by the enterprise, the federal statute literally construed is violated, and the defendant's entire interest in the enterprise is subject to forfeiture under the statute. I emphasize this, because it is not readily conceivable to me that the Congress intended automatic forfeiture of an entire ownership in a business enterprise, however and whenever acquired (whether by inheritance or by legitimate business operations), irrespec-

tive of the magnitude of the "racketeering" conduct involved. *Ibid.*

The only other court which has addressed this issue, did so indirectly. In discussing the defendant's argument that the forfeiture provisions of the RICO statute violated the Eighth Amendment's prohibition against cruel and unusual punishment, the Second Circuit noted that the trial judge has "a certain amount of discretion in avoiding draconiam (and perhaps potentially unconstitutional) applications of the forfeiture provisions. *United States v. Huber,* 603 F.2d 387, at 397 (2nd Cir., 1979). Based upon that discretion, the Court rejected the defendant's argument. Therefore, although this issue has only been addressed by two courts, each of them have reached different results.

It should be noted also that the Fifth Circuit not only ruled that the provisions of the RICO statute were mandatory, but it also ruled that they were not subject to the "suspension" provisions of the Federal Probation Act. (18 U.S.C. §3651-3656). Again, this issue has never been decided by this Court or any other appellate court. The Fifth Circuit could find no authority for its position but relied on the fact that there was no indication that Congress intended to allow the suspension of forfeiture under the Federal Probation Act. *United States v. L'Hoste,* supra at 814. However, this reasoning does not take into account the clear language of the statute. 18 U.S.C. §3651 provides in part that:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, ***may suspend the imposition or execution of sentence*** . . . (Emphasis supplied.)

The word "sentence" is not limited to either imprisonment, fines, or forfeitures. Rather, it is broad enough to include all of them. In fact, it has already been interpreted to include fines. *United States v. Beacon Piece Dying and Finishing Co.*, 455 F.2d 216, 217 (2nd Cir., 1972). There is no logical reason why it also should not be interpreted to include forfeitures. This is particularly true since forfeitures have never been favored in our law. *Howard v. Federal Crop Insurance Corp.*, 540 F.2d 695 (4th Cir., 1971).

In view of the importance of this issue and the unusual and disfavored nature of the forfeiture penalty, petitioners respectfully suggest that this matter is appropriate for hearing before this Court.

CONCLUSION

For the above reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been served on the respondent by placing copies of same in the United States mail, postage prepaid, addressed to:

Mr. John Volz
United States Attorney
Hale Boggs Federal Building
500 Camp Street
New Orleans, Louisiana 70130

Solicitor General of the
United States
United States Department of
Justice
Washington, D.C.

this _____ day of _____, 1980.

_____
JULIAN R. MURRAY, JR.

APPENDIX "A"

UNITED STATES v. L'HOSTE

UNITED STATES of America,
Plaintiff-Appellee,
v.
Robert J. L'HOSTE, R. J. L'Hoste & Company, Inc., Clarence Eugene Rogers and Marvin Cochran, Defendants-Appellants.

In re UNITED STATES of America, Petitioner.
Nos. 78-5593, 79-1606.

United States Court of Appeals,
Fifth Circuit.

Jan. 10, 1980.

Defendants were convicted in the United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., of conspiracy and racketeering and they appealed. The Government petitioned for a writ of mandamus directing the district court to order forfeiture of one defendant's interest in a company allegedly involved in racketeering. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) the indictment was not unconstitutionally broad or vague; (2) defense counsel was not entitled to personally voir dire prospective jurors; (3) the Louisiana bribery statute prohibited the entertainment of public officials and favoring them with gifts in order that business expectations might be enhanced; (4) the district court did not err in reinstructing the jury on conspiracy; and (5) the forfeiture provision of the racketeering statute was mandatory rather than discretionary.

Affirmed in part; writ of mandamus to issue.

1. **Indictment and Information —71.-4[3]**

In prosecution for conspiracy and racketeering, indictment adequately informed defendants of pending charges and enabled them to plead acquittal or conviction to bar any future prosecutions for same offenses; furthermore, indictment did not violate single conspiracy rule. 18 U.S.C.A. §§ 2, 371, 1962(c).

2. **Jury —131[1]**

Defense counsel was not entitled to personally voir dire prospective jurors. Fed. Rules Crim. Proc. rule 24(a), 18 U.S.C.A.

3. **Bribery—1[1]**

Practice of entertaining public officials and favoring them with gifts in order that business expectations might be enhanced could constitute violation of Louisiana bribery statute; bribery was not restricted to those acts made in anticipation of specific official action. LSA—R.S. 14:118.

4. **Criminal Law —1152[1]**

Trial court is given broad discretion in weighing its jury instructions and will not be reversed as long as charge correctly states substance of law.

5. **Criminal Law —829[1], 830**

Trial judge is under no obligation to give requested instruction that misstates the law, is argumentative, or has been covered adequately by other instructions.

6. **Criminal Law —865[2]**

Where trial court reinstructed jury with portion of conspiracy

charge responsive to its inquiry, reminded jury of prior instructions, and advised it to consider entire charge, including the supplementary part, as a whole, there was no error.

7. Forfeitures —3

Forfeiture of property involved in violation of racketeering statute was mandatory rather than discretionary. 18 U.S.C.A. § 1963(a).

8. Forfeitures —5

District court's ability to set terms and conditions of forfeiture of property involved in racketeering is limited and any abuse of its discretion is subject to review of Court of Appeals. 18 U.S.C.A. § 1963(a)

9. Forfeitures —5

After jury returned guilty verdict on charges of conspiracy and racketeering, district court's submission to jury of questions of whether defendant maintained his interest in company in violation of racketeering statute, and whether his interest in company afforded source of influence over any enterprise which he had established, operated, controlled, conducted or participated in conduct of in violation of racketeering statute formed adequate basis on which to order forfeiture of defendant's interests in company involving racketeering. 18 U.S.C.A. §§ 1962(c), 1963(a).

10. Forfeitures — 5

Federal Probation Act did not give district court power to suspend imposition or execution of forfeiture. 18 U.S.C.A. § 3651.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana.

Before TJOFLAT and VANCE, Circuit Judges, and ALLGOOD,* District Judge.

TJOFLAT, Circuit Judge:

Robert J. L'Hoste, R. J. L'Hoste & Company, Inc., Clarence Eugene Rogers, and Marvin Cochran appeal their convictions for conspiracy, 18 U.S.C. § 371 (1976)[1] and racketeering 18 U.S.C. §§ 2, 1962(c) (1976),[2] arising out of their involvement in sewer construction contracts for Jefferson Parish, Louisiana. They challenge the sufficiency of the indictment, the method of jury selection, and the adequacy of the trial court's instructions to the jury. Consolidated with this appeal is the Government's petition for a writ of mandamus directing the trial court to order the forfeiture of L'Hoste's interest in R. J. L'Hoste & Company, Inc. under 18 U.S.C. § 1963(a) (1976). See slip opinion 2295, page --- *infra*. We affirm the convictions and grant the petition for mandamus.

* District Judge for the Northern District of Alabama, sitting by designation.

1 18 U.S.C. § 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2 18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities or which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

I

The history of this prosecution is convoluted and repetitious. On December 1, 1977, the federal grand jury in the Eastern District of Louisiana indicted thirteen defendants, including the appellants, for conspiracy and racketeering activity. After the defendants moved to dismiss the indictment for overbreadth and vaguensss, the grand jury returned a superseding indictment on February 27, 1978, charging the same offenses and naming eleven defendants, including the appellants. The district court denied a motion to dismiss the superseding indictment, and trial commenced on March 13, 1978. The jury convicted the four appellants and another corporation on both the conspiracy and racketeering counts.[3] In subsequent proceedings, the court instructed the same jury to decide whether any property was subject to forfeiture under section 1963, but dismissed the jury when it became deadlocked. On the day of sentencing, the court granted on various grounds the defendants' motion for a new trial, criticizing in the process the complex nature of the indictment.

At this point the case was reassigned to another district judge. Meanwhile, in an attempt to remedy any infirmities that may have existed in the indictment, the Government obtained a third indictment, again charging the appellants with conspiracy and racketeering activity. The defendants moved for dismissal on grounds of vagueness and overbreadth. The motion was denied, and the defendants' petition for a writ of mandamus, asserting the same grounds, was rejected by this court. Due to the extensive publicity the case had received, the court granted amotion for change of venue, and the trial was moved to Houston, Texas. Trial began on July 24, 1978. During the first week, defense counsel moved for a mistrial, claiming that this court's panel decision in *United States v. James*, 576 F.2d 1121 (5th Cir. 1978), *modified*,

3 The other corporation was George C. Eckert Enterprises, Inc. After its conviction was set aside, see text *infra*, this corporation, along with the appellants, was reindicted, but the charges as to it were eventually dismissed on the Government's motion.

590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, ------- U.S. ----, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), prevented a district court from trying to a jury a conspiracy case, such as this one, without first holding a hearing, in the absence of the jury, to rule upon the admissibility of any out-of-court coconspirator statement the prosecutor might seek to introduce in evidence. The district court, in order to comply with the *James* mandate, granted a mistrial on July 28, 1978. A *James* hearing was conducted, and, on August 1, 1978, a third jury trial began.

The prosecution's evidence implicated the defendants in a labrinthine plot of public bribery. Between 1970 and 1977, Jefferson Parish awarded sewer contracts on an emergency "no-bid cost-plus" basis on the recommendation of Ray Condon, the director of its Department of Sewerage and Drainage. These contracts, financed in large part with federal funds, would have been performed at a substantially lower cost had they been put out for competitive bidding. R. J. L'Hoste & Company, Inc. received seventy-seven percent of the emergency work, totally over $5 million, through a scheme of kickbacks to Condon and others involved in awarding the contracts. Testimony indicated that the costs of these contracts were padded with excessive payrolls and machinery rentals. Job costs, and consequently R. J. L'Hoste & Company Inc.'s profits, were inflated further when L'Hoste, for no legitimate reason, directed that the work be delayed. One job that normally should have lasted a month was drawn out nearly eight months. Dilatory tactics included working at a slow pace, digging up good pipe, making unnecessary repairs, and stopping up water pipes. 1st Supp. Record, vol. 12, at 450, 478-81. During this time, employees occupied their working hours with such unproductive activities as resting under trees, going to the store or snowball stand, and sitting around shooting dice. *Id.* at 478-79. While on R. J. L'Hoste & Company, Inc.'s payroll, employees also did construction and landscaping work at Condon's residences. *Id.* at 453-56, 483-87. Some of the equipment contributing to the cost of the job was run with the clutch disengaged merely to make noise; some was run

only at the times an inspector was present; some was simply inoperable. *Id.* at 456-57, 481-83, 504-06. The inflated rentals for the equipment were channeled to Condon, Frederick Hoth (consulting engineer for the Department of Drainage and Sewerage), and others through conduit rental companies in which they held interests.

Besides the rental scheme, the evidence showed L'Hoste's arranging for Condon and Hoth to take trips to such places as Acapulco, Las Vegas, and Hawaii, and providing other "perquisites," including gifts of interest in property purchased by L'Hoste. The defense attempted to show that the responsibility for the laggard pace and goldbricking rested with Carl Calamia, who had been general superintendent of R. J. L'Hoste & Company, Inc. before being fired and later testifying for the Government under a grant of immunity. The jury, however, was not persuaded that the defendants were inculpable; on August 9, 1978, after eight days of trial, it found all four of them guilty on both counts. The jury then was asked to determine whether L'Hoste maintained an interest in his company in violation of section 1962 and whether his interest allowed him to influence his company; the jury was advised, however, that the actual decision on forfeiture would be made by the court. The jury found that L'Hoste had maintained an interest that permitted him to influence r. J. L'Hoste & Company, Inc. in violation of section 1962.

The district court denied an array of post-trial motions and set sentencing for September 13, 1978, in New Orleans. L'Hoste received fines totalling $35,000 and a sentence of four years in prison, but the court declined to invoke the forfeiture provisions against him. R. J. L'Hoste & Company, Inc. was fined $35,000, Rogers was fined $2,500 and placed on probation, and Cochran received probation. From the judgments of conviction the appellants bring this appeal. The Government's petition for a writ of mandamus arises from the district court's refusal to order a forfeiture of L'Hoste's interest in his company.

II

Appellants raise several points of error concerning the indictment, the method of jury selection, and the court's instructions to the jury. We address these issues in turn.

A. The Sufficiency of the Indictment

[1[Appellants first contend that the indictment under which they were convicted is unconstitutionally broad and vague and violative of Fed.R.Crim.P. 7(c)(1), which requires that the indictment be "a plain, concise and definite written statement of the essential facts constituting the offense charged." To assess the validity of appellants' challenge, we must evaluate the indictment under the two-prong test laid down by the Supreme Court in *Hamling v. United States*, 418 U.S. 87, 117, 97 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). Under this test, the indictment (1) must contain the elements of the offense and fairly inform the defendant of the pending chages and (2) must enable the defendant to plead acquittal or conviction to bar any future prosecution for the same offense. *United States v. Welliver* 601 F.2d 203, 207 (5th Cir. 1979); *United States v. Guthartz*, 573 F.2d 225, 227 (5th Cir.), *cert. denied*, 439 U.S. 864, 99 S.Ct. 187, 58 L.Ed.2d 173 (1978); *see United States v. Diecidue*, 603 F.2d 535, 539-548 & n. 1 (5th Cir. 1979).

Here, the Government modified the indictment twice in an attempt to meet the requirements of *Hamling* and rule 7(c)(1). Although the indictment charged only one count of conspiracy and one count of racketeering activity in a total of fourteen pages, its length and complexity were necessitated, we think by the nature of the crimes charged. Both counts alleged violations of Louisiana and federal law spanning more than seven-and-one-half years and involving more than a dozen different parties. Due to the intricate interrelationships among the many parties within this extended time frame, a lengthy indictment was required to set

forth the elements of the offenses charged, to give the defendants adequate notice of the charges, and to provide a basis for a former jeopardy plea in any sujsequent criminal proceedings stemming from the defendants' conduct in this case.

The conspiracy count contains four major sections. Section A identifies the defendants and the others who participated in the events that gave rise to the charges. Section B alleges that the defendants and others formed a conspiracy (1) to defraud the United States in the use of federal revenue sharing funds, 18 u.s.c. § 371 (1976), (2) to defraud Jefferson Parish of public funds through mail fraud and false pretenses, 18 U.S.C. § 1341 (1976), (3) to travel in interstate commerce and use facilities in interstate commerce with intent to commit public bribery under Louisiana law, 18 U.S.C. § 1952 (1976), and (4) to be associated with enterprises through racketeering activity that affected interstate commerce, 18 U.S.C. § 1962(c) (1976). Section C of the conspiracy count explains the methods used by the conspirators to accomplish their goal. the acquisition of emergency sewer repair contracts. These methods, which often required the use of the mails, included: a rental kickback scheme that provided monies to the parish officials involved in letting the contracts and, on one contract that was competitively bid, enabled R. J. L'Hoste & Company, Inc. to obtain inside information that assisted it in submitting the low price; and additional bribery payments, in the form of vacations and other gifts, to those officials and to others who supervised the contract work. Section D alleges thirty-one overt acts, including the date of each and the involvement of the conspirators, committed in furtherance of the conspiracy.

The racketeering count incorporates the allegations of fact of the conspiracy count and states that the defendants engaged in racketeering activity, in violation of 18 U.S.C. § 1962(c), consisting of mail fraud, 19 U.S.C. § 1341; public bribery proscribed by Louisiana law, La.Rev.Stat.Ann. § 14:118(1) (West 1975 & Supp.1979); and interstate travel and the use of interstate instrumentalities

with intent to commit such bribery, 18 U.S.C. § 1952. In addition, the racketeering count identifies the type of interest subject to forfeiture under 18 U.S.C. § 1963 (1976).

After assaying the indictment against the *Hamling* criteria, we are convinced that they have been met. We are also convinced that the indictment does not transgress rule 7(c)(1). The allegations clearly put the defendants on notice of the offenses charged, advised them of the facts giving rise to those offenses, and furnished an adequate foundation fora plea of double jeopardy in the event of a future prosecution of the defendant for the same conduct.

The appellants argue that the indictment violates the single conspiracy rule of *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946). We cannot agree. In *Kotteakos*, the Supreme Court ruled that the defendants, charged with only one conspiracy, had suffered substantial undue prejudice in being convicted on evidence that showed, the Government conceded, eight different conspiracies. The only common nexus among the conspiracies was the participation of one man in each of them. The case before us is more like *United States v. Wayman*, 510 F.2d 1020 (5th Cir) *cert. denied*, 423 U.S. 846, 96 S. Ct. 84, 46 L.Ed.2d 67 (1975), where we held that "[p] roof of multiple conspiracies does not automatically constitute a fatal variance from a single (conspiracy) charged ..." *Id* at 1025. Instead, the inquiry must focus on whether the variance affects the substantial rights of the accused. If the Government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights. *Id.* at 1025.

We view the proof in this case as having established one conspiracy, in which each appellant was a member. That conspiracy was formed and carried out to achieve but one objective: the acquisition and maintenance of Jefferson Parish's sewer repair work under cost-plus "emergency" contracts. The involvement of each appell-

ant was for the purpose of accomplishing that objective. We are unable to glean proof of other conspiracies from the evidence presented to the jury, and the appellants have pointed to none. Their argument is nothing more than a bald allegation that this is a multiple conspiracy case that runs afoul fo the *Kotteakos* rule. Even were we to suppose that each sewer repair job was the object of a separate conspiracy, a supposition appellants have not asked us to make, the convictions still must be upheld. We say this because the evidence demonstrates that each appellant played a role in the acquisition or execution of at least one of those jobs. Moreover, we are convinced that the manner in which the Government's case was presented did not impair the substantial rights of any appellant.

B. The Method of Jury Selection

[2] Appellants next claim that the trial court committed error by refusing to allow their counsel personally to voir dire the prospective jurors during the jury selection process. Though the defense did not move for a mistrial at that time, they did so later in the trial when one of the jurors was disqualified and had to be replaced with an alternate juror.[4] The appellants do not suggest that

4 During the trial, the court noticed that one of the jurors appeared to have difficulty paying attention and understanding what was happening. After this fact was brought to the attention of counsel, all parties agreed to continue the trial but to observe the joror's conduct. Before the jury retired to deliberate, the court examined the juror in camera and concluded that she had a hearing impairment and had not heard portions of the testimony. The court disqualified the juror and replaced her with the first alternate juror. Defense counsel then moved for a mistrial, claiming that the court's refusal to permit them personally to examine the venire during the jury selection process had deprived appellants of a fair trial. The defense had not objected to the selection of the aiternat during voir dire, and agreed that the juror who could not hear was not competent to sit on the jury. Because the disabled juror was replaced with an alternate whom the defendants did not challenge, they waived any contention that the seating of the alternate alone operated to deny appellants a fair trial. For appeal purposes, appellants are left with the argument that the jury selection method employed by the court in the context of this case either produced a tainted jury as a matter of law or made the likelihood of taint so great that we should assume, conclusively, that a fair and impartial jury was not chosen. See test immediately *infra*.

the court's method of jury selection resulted in the impanelment of one or more jurors, including the alternate, who were unable to try the case faily and impartially. Rather, their argument is that a court-conducted jury voir dire is so inherently unfair, especially in a complicated and notorious case such as this one, as to deny a fair trial as a matter of law.[5]

The answer to appellants' argument is governed by Fed.R.Crim.P. 24.[6] Under rule 24(a), the trial court is given wide discretion in deciding how to conduct voir dire. In the interests of judicial economy and efficiency, the trial court may deny counsel the privilege of addressing the venire by choosing to conduct the entire voir dire itself, allowing both the prosecution and defense the opportunity to supplement the court's examination. This supplemental examination of the venirement may be conducted by counsel personally, or by the court alone. In this case, the court chose the second method.

5 At the heart of appellants' argument that a courteonducted voir dire is inherently unfair is the motion that it impairs counsel's ability to fashion a firm trial strategy. In presenting their motion for mistrial, the defense, though acknowledging that the disabled juror no longer could serv, complained that the seating of the alternate as a member of the jury was so disruptive of their trial strategy that it impaired their ability to muster a defense for their clients. The alternate juror was an engineer, and counsel's strategy, they submitted, was not tailored to the engineer's assumed tastes. Had counsel been allowed personally to examine the venirement during jury selection, the argument proceeds, the hearing impediment of the disabled juror would have been discovered and she would have been excused for cause. Someone else would have taken her place; the replacement, instead of the engineer, would have gone to deliberations; the defense trial strategy would have maintained a greater chance of success. Even if the engineer had been substituted for the disabled juror during the selection process, the defendants, it is explained, would have had ample opportunity to alter their strategy accordingly.

The trial judge considered the argument frivolous. Record, vol. 16, at 1697. We need not consider it now. As we point out in the test *infra*, if defense counsel wanted a more extensive examination of the venirement, including the disabled juror, all they had to do was request the court to make further inquiry. No requests were forthcoming; there were no objections to the examination the court made. The trial judge cannot be assigned with error because the disabled juror's impediment did not surface on voir dire.

6 The relevant parts of Fed.R.Crim.P. 24 provide:

(a) *Examination.* The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospec-

Appellants do not suggest that the trial judge refused to question the veniremen as they proposed; instead, their contention is that *United States v. Ledee*, 549 F.2d 990 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 297, 43 L.Ed.2d 188 (1977), required the court to honor counsel's request to address the veniremen directly. We do not read *Ledee* as according a defendant the right to have his counsel conduct, in whole or in part, the voir dire inquiry. To the contrary, the holding of *Ledee* is that the scope of the inquiry and who conducts it are within the sound discretion of the trial judge. *Id.* at 992-93.[7] Appellants have shown us nothing to indicate that the trial judge abused his discretion in this case. *See Hawkins v. United States*, 434 F.2d 738, 739 (5th Cir. 1970). In our view, he conducted an even-handed examination of the venire. The areas of concern to the parties were covered; no one objected to the content of the court's inquiry or the manner in which it was made. In sum, there is no merit to appellant's claim of error in the conduct of the jury voir dire.

tive jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(c) *Alternate Jurors.* The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to set as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. . . .

7 There is language in *Ledee* suggesting that trial counsel may be in a better position than the judge to uncover a veniremen's bias and prejudice on issues involved in the case. *United States v. Ledee*, 549 F.2d at 993. That language is obviously dicta, suggesting the course a trial judge might follow in a situation where it might be difficult to obtain an impartial jury. The language could not have bound the trial judge to follow a given course of action in this case.

C. The Bribery Instruction

The Government's proof established that the defendants obtained a lion's share of Jefferson Parish's sewer repair business through a furtive plan of bribery. The bribes took many forms: excessive payments for equipment rented from companies owned by parish officials; gifts of land; hunting trips; vacations to Acapulco, Yucatan, Las Fegas, Seattle, Hawaii, New Orleans, Dallas, Houston, and Walt Disney World; and campaign contributions many in excess of $10,000. The defendants' response to this proof was twofold. First, they launched a scathing cross-examination of the prosecutions's most damaging witnesses, Frederick Hoth and Carl Calamia, who, under grants of immunity, described the rental equipment arrangement in detail. These witnesses were so discredited, it was argued, that the Government's theory that the sewer contracts were obtained through a kickback scheme was virtually destroyed. Second, the defendants treated as mere "goodwill" expenditures the few "vacations" and "free lunces" they admittedly gave to certain parish officials and inspectors on the jobs. The defendants likened these gifts to customer entertainment practices routine in the private business world, and argued that since the entertainment practices could not be considered as bribery payments under Louisiana law, neither should the gifts. The balance of the alleged bribes they labeled legitimate campaign contributions. The appellants submit that the trial court committed reversible error when it refused to instruct the jury on the distinction between bribery and goodwill expenditures and thus prevented the jury from accepting their closing arguemtn—that the defendants should be acquitted because entertainment expenses for goodwill are not bribes.

[3] The Louisiana bribery statute, which is applicable to both counts of the indictment,[8] defines public bribery as:

8 Violation of the Louisiana bribery statute, La.Rev.Stat.Ann. § 14:118(1) (West 1974 & Supp.1979), was alleged to be an object of the conspiracy in count one and a racketeering activity in count two.

> the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment or duty:
> . . . Public officer or public employee
> . . . Any person who has been elected or appointed to public office, whether ornot said person has assumed the title or duties of such office.

La.Rev.Stat.Ann. § 14:118 (West 1974 & Supp.1979). We can find nothing in the legislative history or the case law that indicates whether the practice of entertaining public officials and favoring them with gifts in order that business expectations might be enhanced is proscribed by the Louisiana bribery statute. Thus, we must draw on the language of the statute itself for guidance as to the circumstances under which gifts to public officials may be made without incurring the badge of bribery.

The statute makes no distinction on its face between goodwill expenditures and bribery; it encompasses the giving of anything of apparent value when motivated by an intent to influence official conduct. The requisite criminal intent, then, is formed when the gift or favor is intended to influence official action. The district court, over the defendants' objection, opted for a jury instruction that we consider to be facially consistent with this statutory language. After reading the statute to the jury, the court said:

In order to establish that a Defendant is guilty of public bribery under this law, it must be proved beyond a reasonable doubt:

1) The giving or offer to give or something of apparent present or prospective value by the Defendant;
2) That the recipient of the gift or offer is a public officer or public employee whether appointed or elected; and
3) That the gift or offer to give is for the purpose of influencing the official duties of the public office or employee.

. . . . . .

The crimes charged in this case require proof of specific intent before the defendant can be convicted. Specific intent, as that terms implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

As I have told you, an act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

As you know the Government claims that, in connection with both counts of the indictment, that defendants violated the Louisiana statute forbidding public bribery as I have defined that statute to you previously.

It is the position of the Defense that any gifts orpayments to public officials made by Defendants do not constitute bribery for the reason that any such gifts or payments were not motivated by any purpose or intent to influence the public officer's official actions or duties.

It is for you, the jury to determine the merits of this defense from the facts in this case and in accordance with the elements of Louisiana Public Bribery Law about which I have instructed you.

1st Supp. Record, vol. 16, at 1681-82, 1699-89. We consider the court's charge to be consistent with the Louisiana bribery statute because it discussed gifts to a public official or employee made with *specific intent to influence the official duties* of the public servant. The charge does not embrace mere campaign contributions or innocuous gifts made without expectation of official action in return. The jury was clearly authorized to accept the defendants' theory of the case—that their favors to public officials and employees were not made to influence the discharge of their duties. The

appellants contend, however, that the court's charge did not go far enough; the jury should have been instructed that anything business men typically do for their customers to develop and maintain business, by way of gifts, entertainment and the like, cannot be labeled bribery merely because the customer is the government. The defense proposed an instruction embracing this notion.[9] The court tentatively accepted the instruction,[10] but at the charge conference decided that it was not compatible with the Louisiana bribery law and declined to give it.

9 The defendants' requested instruction, based on *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976), read:

> There has been some discussion in this case of campaign contributions, gifts or gratuities made to public officials. Campaign contributions are not illegal and are in fact a part of our political system. However, they may be used to disguise a bribe or an attempted bribe. This is so if there is a specific intent to influence the official to grant a special favor. That is, the funds were given in exchange for the doing of some particular official act.
>
> On the other hand, there are other legitimate business reasons for making gifts or campaign contributions. A generalized hop of some future benefit is not sufficient to conclude that bribery has occurred. The common business practice of entertaining and doing favors for potential customers does not become illegal merely because the customer is a government agency. If you find that the gifts were made, but that the gifts motivated by no more than customary business reasons or a general hope of better business in the future, then you should find that bribery did not take place.

Record, vol. 6, at 1253.

10 The defendants' proposed instruction was redrafted by the district court, apparently to bring it into conformity with the language of *United States v. Arthur*, 544 F.2d 730, 734-35 (4th Cir. 1976), as follows:

> With respect to the allegations of public bribery which form a part of the offenses charged in both Count 1 and Count 2, I instruct you that according to the law not every gift, favor, or contribution to a government or political official constitutes bribery. It is universally recognized that bribery occurs only if the gift is coupled with a particular criminal intent . . .. That intent is not supplied merely by the fact that the gift was motivated by some generalized h ope or expectation of ultimate benefit on the part of the donor . . .. "Bribery" imports the notion of some more or less specific *quid pro quo* (which is a legal term which means in exchange for) for which the gift or contribution is offered or accepted . . .. This requirement of criminal intent would, of course, be satisfied if the jury were to find a "course of conduct of favors or gifts flowing" to a public official *in exchange for* a pattern of official actions favorable to the donor

[4,5] The appellants claim that the trial court's instruction to the jury on the Louisiana bribery statute constitutes reversible error because it swept too broadly, expanding the definition of bribery to encompass innocent conduct. In assessing appellants' claim, we must remember that a trial court is given broad discretion in wording its jury instructions and will not be reversed as long as the charge correctly states the substance of the law. *Cain v. United States*, 274 F.2d 598 (5th Cir.), *cert. denied*, 362 U.S. 952, 80 S.Ct. 864, 4 L.Ed.2d 869 (1960). A trial judge is under no obligation to give a requested instruction that misstates the law, is argumentative, or has been covered adequately by other instructions. *Pass v. Firestone Tire & Rubber Co.*, 242 F.2d 914, 920 (5th Cir. 1957); *Bryant v. Hall*, 238 F.2d 783, 789 (5th Cir. 1956). We have already observed that the court's instruction was consistent with the statute, and that it set out each of the elements making up the offense of bribery. The appellants, citing a Fourth Circuit decision, *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976), nevertheless insist that the instruction was too broad because it did not restrict bribery to those acts made in anticipation of *specific* official action. We fail to see the applicability of the *Arthur* rationale in this case and conclude that the trial court was correct in refusing to charge the jury, as the defense proposed, in the language of the *Arthur* opinion.

> **even though no particular gift or favor is directly connected to any particular official act . . .. It does not follow however that the traditional business practice of promoting a favorable business climate by entertaining and doing favors for potential customers becomes bribery merely because the potential customer is the government. Such expenditures, although inspired by the hope of greater government business are not intended as a *quid pro quo* for that business; they are in no way conditioned upon the performance of an official act or patter of acts or upon the recipient's express or implied agreement to act favorably to the donor when necessary . . .. The benefit must be given in exchange or as compensation for official action—and not merely as an unconditional gift with the hope that a favorable business climate will result—in order to be classified as bribery. The crucial distinction between "goodwill" expenditures and bribery is . . . the existence or nonexistence of criminal intent that the benefit be received by the official as a *quid pro quo* or in other words an exchange for some official act, pattern of acts, or agreement to act favorably to the donor when necessary.**
>
> **Joint Trial Exh. 1.**

United States v. Arthur was a 18 U.S.C. § 656 (1976) [11] prosecution for the misapplication of bank funds. The Government established that the defendant made gifts to state and political party officials of West Virginia with the hope that the state would deposit funds in his bank. The district court, after instructing the jury that the use of bank funds to commit bribery would violate section 656, charged the jury that payments to state government officials to influence them to deposit state funds in the defendant's bank constituted bribery or attempted bribery. The Fourth Circuit found fault with this latter portion of the instruction, considering it to have compelled the jury to find bribery absent proof of criminal intent, and reversed. The court observed that not every gift or political contribution constitutes bribery; it is only when such gifts or contributions are made with criminal intent that bribery occurs.

An analysis of the issues inherent in an 18 U.S.C. § 656 prosecution and the way in which the Fourth Circuit dealt with them in *Arthur* plainly reveals the inapplicability of that decision to the instant case. The threshold question in such a prosecution is whether the conduct with which the defendant is charged amounts to a misapplication of bank funds within the meaning of section 656. This, of course, is a federal question. The opinion in *Arthur* does not disclose what the indictment alleged; it merely recites the Government's position on appeal: that the defendant used "bank funds to pay unlawful bribes and to make illegal political contributions and that such use constituted a misapplication of those funds in violation of 18 U.S.C § 656." 544 F.2d at 733 (footnotes omitted). It is not said whether the bribes were alleged to have been

11 18 U.S.C. § 656 provides in part:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, . . . shall be fined . . . or imprisoned . . . or both; . . ..

made in violation of West Virginia law or a federal common law of bribery. The source of the bribery law the defendant was to have violated was important because the defendant was entitled to adequate notice of precisely what was alleged to be a misapplication of bank funds. The defendant had constructive notice, at least, of the West Virginia bribery statute, W.Va.Code § 61-5A-3 (Supp.1975), but whether he had notice of a federal common law of bribery may have been open to question.[12]

The Fourth Circuit's opinion in *Arthur* contains so explicit acknowledgement that what constitutes misapplication of bank funds under 18 U.S.C. § 656 is a federal question; nor does it mention whether the propriety of the bank officer's conduct was to be measured by the bribery law of West Virginia or the federal common law. Discussion of these issues was avoided; the court passed directly to the question whether the trial judge erred in instructing the jury on how the payment of bank funds to the officials might constitute bribery, and hence misapplication. It was in this context that the court of appeals undertook what we consider to be an abstract analysis of the criminal intent an accused must possess to be convicted of the crime of bribery. In reaching the conclusion that a bribery offense is not consummated unless the questioned favor is made in anticipation of specific official action, the court drew on judicial opinions in a wide variety of cases involving different bribery statutes and arrived as a consensus on the element of criminal intent. The West Virginia statute was included in the canvass as the court considered it to be the most relevant, though not controlling, source of law, the conduct of the defendant having occured in that state.

The court of appeals' analysis does not indicate whether the court was declaring the federal common law of bribery or interpreting a West Virginia statute. If the court was declaring the

12 As for the legality of political contributions, a matter not pertinent to our discussion, notice was provided by 18 U.S.C. § 610 (1970) (current version at 2 U.S.C. § 441b (1976), which makes unlawful certain national bank expenditures for political purposes.

federal common law of bribery, then its canvass of the case law was appropriate. If, however, it was construing the West Virginia bribery statute, what the bribery law of other states or the federal common law may have proscribed seems to us to have beenir-relevant, except, of course, to the extent that such law may have been an appropriate aid to the court in construing the West Virginia statute. In either event, the problem that faced the Fourth Circuit—whether bribery, and, if so, what form of bribery, is proscribed by 18 U.S.C. § 656—is unlike the one confronting us—what constitutes bribery under Louisiana law.[13] Consequently, we fail to perceive the applicability of the *Arthur* rationale in this case.[14]

13 The racketeering statute involved in the instant case directs the federal courts to look to state law to determine whether an act of racketeering, such as bribery, has been committed.

> "(R)acketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; . . .
> 18 U.S.C.§1961(1)(1976

14 Appellants claim that *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), supports their argument that an *Arthur* instruction should be given in an 18 U.S.C. § 1962(c) prosecution that charges bribery as an act of racketeering. The defendants in *Mandel* were indicted on two counts: for racketeering, under section 1962(c), like the appellants here; and for mail fraud, 18 U.S.C. § 1341 (1976). Bribery was alleged as an act of racketeering and as part of the scheme to defraud. The Maryland bribery statute that the defendants in *Mandel* were alleged to have violated as an act of racketeering contains wording similar to the Louisiana statute before this court. The district judge, in charging the jury on what constituted bribery under Maryland law, delivered an *Arthur* criminal intent instruction; because the Maryland and Louisiana statutes are similar, the appellants submit, the Arthur instructions should have been given in this case.

The propriety of utilizing *Arthur* language to express the requisite criminal intent under the Maryland statute apparently went unchallenged in the *Mandel* trial court and, from our reading of the Fourth Circuit's opinion, was not questioned on appeal. That the appellate court, in assessing the adequacy of the jury charge on the mail fraud count, found error in the trial judge's omission of an *Arthur* instruction can be of no comfort to the appellants here. The narrow issue was whether the trial judge, having incorporated an *Arthur* instruction in his charge on the racketeering count, should have repeated it in his submission of the mail fraud count. The court of appeals, one judge dissenting, felt that the overall charge might have con-

Even if we were somehow to read the *Arthur* opinion as a construction of the West Virginia bribery statute, the opinion cannot be persuasive here because the West Virginia statute is quite unlike the Louisiana act now before us. The West Virginia statute made illegal both the payment and the acceptance of "(a)ny pecuniary benefit as *consideration for* the recipient's official action as a public servant or party official . . ." W.Va.Code § 61-5A-3 (Supp.1975) (emphasis added). The use of the word "consideration" in the statute indicated to the court that the gift had to be given in exchange for some official action. The Louisiana statute does not employ the words "as consideration for" or their equivalent to express the intended purpose of the gift. Employed instead are the words "with the intent to influence . . . conduct." The inquiry under the Louisiana statute, then, is whether the gift is made, not as a *quid pro quo* for specific action, but with the intent to influence the conduct of the public servant in relation to his position, employment, or duty. We think this latter inquiry is a broader one than the inquiry presented by the West Virginia statute and that Louisiana designates as bribery conduct that may well be lawful in West Virginia. The *Athur* definition of bribery, having been fashioned in a context inapposite to the one presented in this appeal, is not persuasive, and the district court was correct in rejecting it.

fused the jury and, on this and other grounds, reversed the convictions on both counts. The Fourth Circuit subsequently took the case en banc and affirmed, by an evenly-divided court, in an unenlightening, two-sentence, per curiam opinion. *United States v. Mandel*, 602 F.2d 653 (4th Cir. 1979) (en banc) (per curiam). The *Mandel* panel opinion is consequently of no precendential value in the Fourth Circuit; nor do we consider it to have any authorative value for our purposes. The parties there did not question and the court did not discuss *Arthur's* precedential force, if any, when a federal district court is anticipating the language the Maryland Supreme Court would employ in expressing the criminal intent necessary for conviction under the Maryland bribery statute. What the Fourth Circuit might say were someone to contend that *Arthur* has no precedential value in such a determination isan open question. The panel's discussion of *Arthur* in its consideration of the mail fraud count is obviously inapposite. As the panel implied, determining whether a scheme to defraud embraces a scheme to commit birbery is a *federal question*, not a question of state law. 591 F.2d at 1359-63. Thus, in speaking to bribery as a facet of fraud, the jury instruction was not an expression of state law. In speaking of bribery as an act of racketeering, however, the instruction had to conform to state law. See not

The instruction proposed by the defense was also inappropraite because of its biased and argumentative character; the same is tru as to the instruction the trial judge initially contemplated giving but eventually rejected. Both instructions would have bound the jury to return verdicts of not guilty in the face of proven bribery. In the instruction formally requested by the defendants, the final sentence states: "If you find that the gifts were made, but that the gifts were motivated by no more than customary business reasons. ... then you should find that bribery did not take place." See note 9 *supra*. The jury would have been bound to treat as innocent any gifts made for customary business reasons. This, in our view, would be a rank misapplication of the Louisiana bribery law. Customary business practice could embrace all sorts of extravagant favors intended to influence important business decisions. The type of favor, the manner in which it is given, and its timing are things a businessman no doubt considers in courting his client; he has an economic incentive to employ his resources in a manner that will produce the greatest return. It is obvious that the same incentive motivates businessmen in their commercial dealing with governmental bodies; by the size and timing of their favors, however, they may transgress the bribery laws. In our view, the instruction proposed by the defense would have foreclosed a finding of such transgression.

The instruction the court contemplated giving possesses the same infirmity. This instruction was taken nearly verbatim from the language of the opinion in *Arthur* language that did not purport to represent a model jury instruction on bribery. This instruction would have advised the jury: "It does not follow however that the traditional business practice of promoting a favorable business climate be entertaining and doing favors for potential customers becomes bribery merely because the potential customer is the government. *Such expenditures...are not intended as a quid pro quo for the business....* (emphasis added). See note 10 *supra*. Like the instruction initially requested by the defense, the court's tentative instruction would have prevented the jury from convict-

ing the defendants of activity that the Louisiana legislature sought to condemn. As we have observed, certain practices designed to promote business in the private sector may very well be intended as a *quid pro quo* for that business. Yet, in the public sector, the same practices may run counter to a bribery statute. Even if appellants' theory is correct—that some *quid pro quo* must be found to satisfy the requisite criminal intent for bribery—the court's tentative instruction misstated the law and was properly removed from its final charge to the jury. In summary, defendants wanted the jury to be bound to find that any favor falling within the amorphous categories of "customary" or "traditional business practice was not bribery, when it easily could have been.

While this court recognizes that all expenditures made by business men to public servants are not motivated by the criminal intent necessary for bribery, we cannot fault the district court for failing to articulate the difference between licit and illicit business expenditures in its charge to the jury. The judge gave defense counsel the opportunity to formulate another instruction that accurately reflected the difference, but none was forthcoming. 1st Supp.Record, vol. 16, at 1486. The court then proceeded to instruct the jury on the element of specific intent—that defendants must have made the gifts for the purpose of influencing the duties of the public servants and must have done so voluntarily and intentionally and not for any innocent reason—and on the theory of the defense—that the requisite criminal intent was absent. *Id.* at 1688-89. See Slip opinion 2288-2289, text at pp. _____, *supra*. Thus, the defendants were allowed to argue the distinction between what they termed innocent goodwill expenditures and actual bribery, which they did. 1st Supp. Record, vol. 16, at 1486, 1599. We cannot say that the court misled the jury on the law of bribery or abused its discretion in declining to expound at length on the theory of the defense. Consequently, we find no error in the court's charge on the Louisiana law.

D. Reinstruction of the Jury on Conspiracy Count

[6] After the jury had entered its second day of deliberation, it requested a copy of the court's charge "concerning specifically what constitutes conspiracy and a participant in a conspiracy." 1st Supp.Record, vol. 17, at 1717. The court refusted to provide the jury with a copy of the relevant portion of its final charge, but instead proposed that the jury be reinstructed on that portion. The defense objected, requesting that the court reread the entire charge. The court declined, but offered to instruct the jury on the conspiracy count in full. The defense, though still insisting that the entire charge be read, had no objection, and the jury was thereafter instructed. The judge also reminded the jury to consider, as a whole, the general instructions previously given and not to single out any instruction. *Id.* at 1720-21.

Appellants' complaint here is that the charge on the conspiracy count was heavily weighted in favor of the Government. They cite *United States v. Sutherland*, 428 F.2d 1152 (5th Cir. 1970), in support of their argument. The relevant language of *Sutherland*, however, states:

> In giving additional instructions to a jury—particularly in response to inquiries from the jury—the court should be especially careful not to give an unbalanced charge. If the Judge chooses to give any additional charge and elects not to repeat the entire original charge, he should remind the jury of the burden and quantum of proof and presumption of innocence *or* remind them that all instructions must be considered as a whole *or* take other appropriate steps to avoid any possibility of prejudice to the defendant.

Id. at 1157-58 (emphasis added). Where, as here, the full charge to the jury is lengthy, the trial court can comply with the *Sutherland* requirements by reinstructing the jury with the portion of the charge responsive to the jury's inquiry, by reminding the jury of the prior instructions, and by advising it to consider the entire charge, including the supplementary part, as a whole. "The supplemental charge must be considered as an addition to the original instruction rather than as an independent charge. As long as the combined charges accurately cover the point of law at issue, no reversible error exists." *United States v. Blevins*, 555 F.2d 1236, 1239 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978).

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III

[7] The Government has petitioned this court for a writ of mandamus compelling the district court to order the forfeiture, under 18 U.S.C. § 1963, of L'Hoste's interest in R. J. L'Hoste & Company, Inc. Forfeiture is one of the criminal penalties provided by section 1963(a):

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kine affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

The Government's basic contention is that the language of section 1963(a) makes forfeiture mandatory rather than discretionary as the district court viewed it. The district court acknowledged that the language could be read as mandatory, but concluded that other provisions, which it did not identify, in the statute gave it the power to determine whether forfeiture should be granted. The court was concerend that Mrs. R. J. L'Hoste's community property interest in the stock owned by her husband would be adversely affected by a forfeiture and concluded that the authority expressly granted it to set the terms and conditions of forfeiture implied the authority to protect the rights of innocent persons, such as Mrs. L'Hoste. In addition, the court felt that its power to sentence the defendant L'Hoste was sufficient to give it full discretion with regard to the forfeiture.

The Government's position is supported by the presence in the statute of the word "shall" rather than language carrying facultative connotations. We must, however, go beyond the precise woring utilized to determine the intent of Congress, since "shall" is sometimes construed as the equivalent of "may" when used in statutes. *Richbourg Motor Co. v. United States,* 281 U.S. 528, 534, 50 S.Ct. 385, 387, 74 L.Ed. 1016 :1930).

This court has already stated the procedure to be employed in determining congressional intent.

> The most persuasive evidence of Congressional intent is the wording of the statute. . . . Use of the word "shall" generally indicates a mandatory intent unless a convincing argument to the contrary is made. . . . Such an argument may be waged when extrinsic aids such as purpose of the statute, the statute as a whole, or the legislative history indicates an intention that the statute be given a discretionary effect.

Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977) (citations omitted). We must look first to the language Congress actually utilized in the enactment to determine if apparently mandatory wording is to be given discretionary effect. An analysis of the language used supports a mandatory forfeiture. The criminal penalties of fine and imprisonment are presented in the disjunctive, allowing either fine *or* imprisonment *or* both. On the other hand, criminal forfeiture is mentioned in the conjunctive with the other formats of penalties, leaving the implication that forfeiture is required. In addition, the statute gives the sentencing court wide latitude in determining the amount of the fine and term of the sentence, subject, of course, to the limits established. In contrast, nothing in subsection (a) concerning the act of forfeiture itself indicates discretion resting with the trial court.

Since the district court did not point to the other provisions of section 1963 that seem to confer a discretion not to order forfeiture, we must examine the remaining provisions of that section to determine whether the district court is given such latitude. The other provisions of section 1963, subsections (b) and (c), provide:

> (b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.
>
> (c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customes laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties are as imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Under subsection(b), the district court is given jurisdiction to deal with the property involved in the forfeiture, including a broad authorization "to take such other actions . . . in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper." The type of action the court is empowered to take, however, relates to the protection of the Government's interest in the property. Because context is important in the quest for the meaning of a phrase, *United States v. Bishop*, 412 U.S. 346, 356, 93 S.Ct. 2008, 2015, 36 L.Ed.2d 941 (1973), the examples of the court's power set forth in the statute give guidance as to the type of action that the court may take under the apparently open-ended authorization clause. The statute specifically gives the district court the authority to enter restraining orders and prohibitions and to accept satisfactory perfformance bonds. These steps can be taken in aid of the courts jurisdiction over the property subject to forfeiture, so that hose holding forfeitable interests cannot dispose of them prior to forfeiture and thus render the forfeiture illusory. This reading is supported by the House report on the Organized Crime Control Act of 1970, Pub.L. No. 91—452, 84 Stat. 922 (codified in scattered sections of U.S.C.), which states: "Subsection (b) provides for the entering of restraining orders and prohibitions and the requiring of performance bonds to prevent preconviction transfers of property to defeat the purposes of the new chapter." H.R.Rep. No. 91—1549, 91st Cong., 2d Sess. 57, *reprinted in* (1970) U.S.Code Cong. & Admin.News pp. 4007, 4033. Therefore, we hold that the discretion given the district court by the open-ended authorization clause of subsection(b) relates to collateral measures dealing with the preservation of the property subject to forfeiture rather than the forfeiture itself.

In denying the forfeiture, the district court apparently relied on the first sentence of subsection (c), which directs the district court to authorize the Attorney General to seize the forfeited property "upon such terms and conditions as the court shall deem proper." Again, the statute contains the word "shall" in instructing the

district court to act, but gives it discretion to determine the "terms and conditions" of the forfeiture. This discretion apparently encompasses the determination of such administrative details as the time and place that the property declared forfeited is to be seized by the Attorney General.

The district court's discretion, though, is not unfettered. Insight into the scope of this discretion is provided by subsection (c), which incorporates the relevant provisions of the customs laws dealing with forfeitures and the disposition of forfeited property. The customs laws allow the redemption of property subject to forfeiture, the compromise of Government claims against property, and the remission or mitigation of penalties, including forfeiture. 19 U.S.C. §§ 1614, 1617, 1618 (1976). The discretion whether to grant a remission or mitigation of a forfeiture, however, is given the collector of customs and the Secretary of the Treasury. Under these laws, courts have very little control over actions taken by those charged with the power to grant remission and mitigation. *United States v. One 1970 Buick Riviera Bearing Serial No. 494870H810774*, 463 F.2d 1168, 1170-71 (5th Cir.), *cert. denied*, 409 U.S. 980, 93 S.Ct. 314, 34 L.Ed.2d 244 (1972). Various courts have held that a district court is without jurisdiction to grant remission or mitigation of a forfeiture under 49 U.S.C. § 782 (1976), which incorporates the forfeiture provisions of the customs laws. *See, e. g., United States v. One 1961 Cadillac*, 337 F.2d 730, 733 (6th Cir. 1964); *United States v. Andrade*, 181 F.2d 42, 46 (9th Cir. 1950); *United States v. One 1952 Buick Special Riviera*, 136 F.Supp. 253, 254 (D.Minn. 1955); *United States v. One Oldsmobile Sedan*, 118 F.Supp. 450, 452 (E.D.La. 1954). *But cf. United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979) (though not directly faced with issue, court assumes that district court has jurisdiction and implies that it has discretion under § 1963(c) to avoid unconstitutionally harsh applications of forfeiture).

[8] The duties that normally fall upon the collector of customs or any other person involved in the disposition of property under

the customs laws are to be performed by the Attorney General under section 1963(c). The Attorney General, rather than the court would appear to have the power and discretion involving the remission and mitigation of forfeiture. Thus, the district court's ability to set the "terms and conditions" of the forfeiture are limited, and any abuse of its discretion is subject to the review or this court. *See United States v. Denson*, 603 F.2d 1143 (5th Cir. 1979) (en banc).

The meaning of the plain language of section 1963 is not changed by a study of its legislative history. Neither we nor L'Hoste have been able to discover any congressional material that indicates Congress intended a permissive rather than a mandatory forfeiture. To the contrary, the House and Senate reports discuss the forfeiture penalty in mandatory terms:

> Section 1963 provides criminal penalties—including criminal forfeitures—for violation of section 1962. The maximum penalty authorized under subsection(a) is a $25,000 fine and imprisonment for 20 years. *But, in addition, violations shall be punsihed by forfeiture* to the United States of all property and interests, as broadly described, which are related to the violations.

H.R.Rep. No. 91—1549, 91st Cong., 2d Sess. 57(1970), *reprinted in* (1970) U.S. Code Cong. & Admin.News at p. 4033 (emphasis added).

> Section 1963 provides criminal penalties for the violation of section 1962, above. Subsection (a) provides the remedy of criminal forfeiture. Forfeiture trials are to be governed by the Fed.R.Crim.P. But see Fed.R.Crim.P. 54(a)(5). *The language is designed to accomplish a forfeiture of any "interests" of any type in the enterprise acquired by the defendant or in which the defendant has participated in violation of section 1962.* For the purposes of this section, 18 U.S.C. § 3563, insofar as it is appliable to forfeiture is no longer the law. . . . A $25,000

S.Rep. No. 91—617, 91st Cong., 1st Sess. 160 (1969) (emphasis added). Forfeiture was viewed as an innovative measure that was necessary to undermine the economic base of those convicted of racketeering activity. *See id.* at 78-80.

Moreover, when Congress intended the penalty of forfeiture to be non-mandatory in another section of the Organized Crime Control Act of 1970, it clearly indicated this in the language of the enactment. In prohibiting and establishing penalties for illegal gambling activities, Congress also included a forfeiture provision, although it used permissive instead of mandatory language: "Any property, including money, used in violation of the provisions of this section *may be seized and forfeited* to the United States. 18 U.S.C. § 1955(d) (1976) (emphasis added). Because the clear wording of section 1963 has not been rebutted, but on the contrary is supported by such extrinsic aids as a reading of the statute as a whole, its purpose, and its legislative history, we must conclude that it mandates the district court to order forfeiture when the designed conditions precedent have been met.

The trial court's concern about the protection of innocent persons, specifically Mrs. L'Hoste, does not require the erosion of the directive nature of section 1963's language. Subsection(c) makes clear that the innocent parties' rights in the forfeited property are to be protected by providing that "[t]he United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons." Thus, Congress plainly addressed the possible hardship that forfeiture could cuase to those innocent parties holding an interest in the forfeited property and gave responsibility to the United States, not the district court, to alleviate the hardship. It would appear that Mrs. L'Hoste's remedy lies in petitioning the United States, through the Attorney General, for her interest in the stock or one-half the proceeds from the sale of her husband's 633⅓ shares.

Finally, the mandatory forfeiture provision does not deprive a district court of its right to sentence a defendant, as the trial court here believed. The district court's sentencing function only relates to fines and imprisonment, and this function is in no way impaired or impeded by the presence of the mandatory forfeiture provision. Rather, the consequences of forfeiture in a given case may well be taken into account by th court in fashioning its sentence.[15]

Because the district court erred in believeing that forfeiture was non-mandatory, it had no occasion to establish any terms and conditions for the forfeiture under section 1963(c). In light of our analysis, we grant the Government's petition for a writ of mandamus; the forfeiture shall be ordered. It is for the district court to set whatever terms and conditions of the forfeiture may be appropriate.

L'Hoste next contends, that, even if this court were to hold that the forfeiture was mandatory under section 1963, it would not be an appropriate remedy in the present case because the jury did not decide whether forfeiture must be granted. Since the district court considered the forfeiture provision permissive, it withheld the ultimate issue from the jury while having the jury decide whether the statutory conditions of section 1963(a) had been met. Under that section, one who is convicted of racketeering activity must forfeit to the United States (1) any interest acquired or maintained in

15 The forfeiture penalty incpororated in section 1963 differs from other presently existing forfeiture provisions in federal statutes. Under other statutes, the forfeiture proceeding is in rem against the property, since the property being forfeited is itself considered the offender, and the forfeiture is no part of the punishment for the criminal offense. By enacting section 1963, however, Congress revived the concept of forfeiture as a criminal penalty against the individual, since the proceeding is in personam against the defendant and the forfeiture is part of the punishment. *SEE* S.Rep. No. 91—617, 91st Cong., 1st Sess. 124-25 (1969). Even though the forfeiture is part of the punishment, we see no reason why Congress cannot mandate a specific penalty for a violation of a criminal statute.

violation of section 1962 and (2) any interest affording a source of influence over any enterprise with which that person has been involved in violation of section 1962. Accordingly, immediately after it had returned the guilty verdicts on the conspiracy and racketeering counts, the jury was asked to answer two questions concerning the forfeiture issue:

> 1. Did Defendant, Robert J. L'Hoste maintain his interest in R. J. L'Hoste & Company, Inc. in violation of Section 1962? . . .
>
> 2. Did his interest in R. J. L'Hoste & Company, Inc. afford a source of influence over any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of Section 1962?

Record, vol. 17, at 1759-60. The jury answered both questions in the affirmative.

[9] L'Hoste argues that under Fed.R.crim.P. 31(e)[16] the jury needed to make the ultimate determination on the forfeiture question. He contends that even though it might logically follow from the issues determined by the jury that his interest in his company must have been subject to for forfeiture, this conclusion by the court would violate his right to trial by jury. When the questions dealing with forfeiture were submitted to the jury, L'Hoste was aware that it would make the actual determination of forfeiture, yet made no objection. He has thus not preserved this point on appeal.

Nor can we say that this point may be raised as plain error. L'Hoste cites *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), to support his position. We find *McClain* inapposite. In *McClain*, this court reversed convictions under the National Stolen

16 Fed.R.Crim.P. 31(e) provides:

Criminal Forfeiture. **If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.**

Property Act, 18 U.S.C. §§ 2314, 2315 (1976), because the trial court had incorrectly instructed the jury as to the applicable law and thereby had removed essential factual determinations from the jury. The issue in that case was whether pre-Columbian artifacts had been stolen from Mexico. The trial court had instructed the jury that since 1897 Mexican law had made pre-Columbian artifacts the property of Mexico; in actuality, however, Mexican law had not made every pre-Columbian artifacts the property of Mexico until 1972, and had contained numerous exceptions from 1897 until 1972. In response to the Government's claim that the instruction was harmelss error because the allegedly stolen pre-Columbian artifacts were found in the United States in May 1973, nearly a year after all such artifacts had become the property of Mexico, this court ruled that the Government's contention asked too much; the jury needed to make the essential factual determinations of "recent exportation" that would have supported the convictions for possessing "stolen" property.

Unlike *McClain*, the present case does not involve a factual issue that has been left undecided by the jury. Pursuant to rule 31(e), the trial court submitted for jury determination the essential factual issues involved in the forfeiture under section 1963(a). The jury found that L'Hoste's interest in R. J. L'Hoste & Company, Inc. was subject to forfeiture. Thus, the jury met the requirements of rule 31(e) by determining the extent of L'Hoste's interest or property subject to forfeiture, and all that remained for the district court was to order forfeiture under section 1963. L'Hoste was not deprived of his right to a jury determination of the factual issues necessary for the court to order a forfeiture of his interest in his companies.

[10] Finally, L'Hoste asks this court to rule that the trial judge has the discretion under the Federal Probation Act, 18 U.S.C. §3651—3656 (1976), to suspend the forfeiture. Under section

3651,[17] a district court is given the power to suspend the imposition or execution of a sentence. The clear language of the statute allows the suspension of jail sentences and has been interpreted to allow the suspension of fines. *United States v. Beacon Piece Dyeing & Finishing Co.*, 455 F.2d 216, 217 (2d Cir. 1972). As to forfeitures, however, the statute is silent. Again, neither we nor L'Hoste have been able to find any support for the proposition that section 3651 gives the district court the power to suspend the imposition or execution of a forfeiture. Moreover, the rationale that motivated Congress to reinstitute the forfeiture penalty indicates that it was enacted to serve a purpose other than that of a criminal sentence involving a fine or imprisonment. In consideration of the ineffectiveness of prior penalties in dislodging organized crime, Congress revived the penalty of criminal forfeiture to deprive those convited of racketeering activity of their economic base so that they could not easily continue illegal activities. S.Rep. No. 91—617, 91st Cong., 1st Sess. at 79(1969); *see United States v. Rubin*, 559 F.2d 975, 991 (5th Cir. 1977). Because of the difference between forfeiture and punishment by fine or imprisonment, and absent any indication that Congress intended to allow the suspension of forfeiture under the Federal Probation Act, we cannot hold that the district court had the power to suspend the forfeiture.

17 18 U.S.C. § 3651 provides in part:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court haivng jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

IV

For the reasons we have set forth, the appellants' convictions in the district court are affirmed. As for the matter of forfeiture, the clerk shall issue a writ of mandamus commanding the district court to order forfeiture in a manner not inconsistent with this opinion.

AFFIRMED IN PART; WRIT OF MANDAMUS TO ISSUE.

APPENDIX "B"

UNITED STATES v. L'HOSTE

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert J. L'HOSTE, R. J. L'Hoste & Company, Inc., Clarence Eugene Rogers and Marvin Cochran, Defendants-Appellants.

In re UNITED STATES of America, Petitioner.

UNITED STATES OF America, Plaintiff-Appellant,

v.

Robert J. L'HOSTE and R. J. L'Hoste & Company, Inc., Defendants-Appellees.

Nos. 78-5593, 79-1606 and 78-3457.

United States court of Appeals,
Fifth Circuit.

April 8, 1980.

Appeals from the United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., Judge.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion January 10, 1980, 5 Cir., 1980, 609 F.2d 796).

Before TJOFLAT and VANCE, Circuit Judges, and ALLgood. District Judge.

PER CURIAM:

The petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.[1]

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.

TATE, Circuit Judge, with whom RUBIN, KRAVITCH and POLITZ, Circuit Judges, join, dissenting from the Denial of a Rehearing for En Banc Consideration.

The panel decision decided, in this case of first impression, that upon conviction for "racketeering," 18 U.S.C. § 1962(c), the district court is without the same discretion to suspend or condition the forfeiture penalty provided for such conviction that it has with

*** District Judge for the Northern District of Alabama, sitting by designation.**

1 Judge Charles Clark did not participate in the consideration of the Petition for Rehearing En Banc.

regard to the imprisonment (not more than twenty years) or fine (not more than $25,000) penalties likewise statutorily provided for the crim. 18 U.S.C. § 1963(a). The district court held to the contrary correctly in my present view. In view of the importance of the holding and the extraordinarily harsh and unusual nature of the forfeiture penalty, the issue merits en banc consideration. Therefore, I respectfully dissent from our denial of the defendants' application for rehearing en banc.

Before I discuss the statutory provisions in particular, it is appropriate to note, in the context of American history, the unusual nature of the present forfeiture provision. It hearkens back to pre-Revolutionary English law, when by forfeiture those who fell into Crown disfavor were subject to not only execution, imprisonment, or fine, but also to loss of their entire estate, whether inherited or however acquired. As this court stated in *Unted States v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977):

> Unlike *in rem* forfeiture proceedings against contraband or articles put to unlawful use, § 1963 operates against the person of the defendant and includes within the punishment for his crime forfeiture of a portion of his estate. Such a provision, while known to the common law of England and the colonies, is foreign to the federal criminal law. The 91st Congress recognized that, in passing § 1963, that it was partially repealing a statute passed by the First Congress, which in its present form provides that: "No conviction or judgment shall work corruption of blood or forfeiture of estate." 18 U.S.C. § 3563. *See United States v. Mandel*, 408 F.Supp. 679 (D.Md.1976); S.Rep. 91—617, 91st Cong., 1st Sess. 79—80 (1969), (hereinafter S.Rep.); 116 Cong. Rec. 35205, 35208 (remarks of Rep. Mirka, Rep. Ryan).

Having this in mind, and also the principle that criminal laws and penalties are to be strictly construed, I am unable to agree with the persuasively-reasoned majority opinion that a section 1963 for-

feiture, a most harsh and unusual penalty, was legislatively intended to be mandatory upon conviction. In the absence of stronger indication of Congressional intent to the contrary, the preferable construction of section 1963 is not to deprive the district court of any discretion whatsoever with regard to imposition of this penalty, in conformity with the usual statutory discretion accorded it with regard to the imprisonment and fine penalties provided by the same statute.

18 U.S.C. § 1963(a) provides:

> Whoever violates any provision of section 1962 of this chapter *shall* be fined not more that $25,000 or imprisoned not more than twenty years, or both, and *shall* forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962. (Italics added).

On its face, this section of the statute seems to mandate at least some fine or imprisonment (within statutory limits), as well as mandating forfeiture, with no suspension permitted for the sentence thus mandated. However, as the panel notes, the district court is empowered to suspend any imprisonment or fine imposed by virtue of 18 U.S.C. § 3651.[1] In terms, this enactment permits the suspension only of jail sentence, but it has been judicially interpreted to allow the suspension also of fines. Because the statute is silent as to forfeitures, however, the panel infers that a sentencing court is without authority to suspend this feature of a sentence, even though the suspension provision is equally silent as to suspension of a fine. I would not read into section 1963 any legislative intent to limit the usual power of the trial court, "when satisfied

1 18 U.S.C. § 3651 provides in part:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

. . . . .

that the ends of justice and the best interest of the public as well as the defendant will be served thereby," to "suspend the imposition or execution of sentence." 18 U.S.C. §3651.

In the light of the usual discretion of the sentencing judge in the imposition of any sentence, I would not infer any Congressional intent, unless much more clearly stated, to deprive the judge of discretion in the imposition of the forfeiture penalty. In virtually all criminal penalties provided in Title 18, the word "shall" in the penalty provision is used in pro forma drafting style— "*Shall* be fined . . . or imprisoned" is the terminology in virtually all the statutory sentence provisions. The circumstance that this sentencing formula word "shall" is used with regard to the forfeiture provision of the present statute does not, it seems to me, by itself indicate any Congressional intent to deny sentencing discretion to the trial court with regard to forfeiture, any more than it does with regard to imprisonment or fine.

I am re-enforced in this view (a) by a particular provision in the racketeering statute, 18 U.S.C. §§ 1961 *et seq.*, as well as (b) by the sweep of the statutory crime so broadly defined as, without judicial supervision, to raise the spectre of selective enforcement of the federal crime, in order to secure forfeitures for what in essence are local state crimes, by members of the executive branch less well-intentioned than those who brought the present prosecution. I cannot at the present believe it was the intention of Congress to leave to a prosecutor alone the determination to achieve forfeiture of an accused's property by prosecuting him under the federal racketeering statute for what, as statutorily defined with regard to the present case, represents only two or more violations of local bribery statutes or of somewhat esoterically applied federal crimes, themselves punishable by imprisonment or fine, but not by forfeiture.

First, having regard to the unusual nature of the forfeiture penalty and to the strict construction required of penal statutes, I

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

believe, as did the trial judge, that 18 U.S.C. § 1963 itself evidences an intention to afford the sentencing judge his usual sentencing discretion with regard to forfeitures. Subsection (c) provides: "Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest *declared forfeited* under this section *upon such terms and conditions as the court shall deem proper.* (Italics added.) Despite the panel's persuasive reasoning to the contrary, I, like the trial judge, feel that this statutory language allows the sentencing judge discretion to provide the terms and conditions of forfeiture within the broad discretion thereby statutorily indicated.

Second, with regard to the "racketeering" crime denounced by 18 U.S.C. §§ 1961 *et seq.* we ourselves noted in *United States v. Rubin,* 559 F.2d at 991:

> Besides the unprecedented nature of the forfeiture sanction, the uncertain reach of "patterns of racketeering activity"—the gravamen of a § 1962 offense—requires interpretive caution in this area. . . . While addressed to organized crime, the Act is not limited in application to members of that undertaking.

In the present case, the defendants were convicted of a violation of 18 U.S.C. § 1962(c), as being employees of or persons associated with an enterprise affecting interstate commerce who directly or indirectly participated in the conduct of the enterprise's affairs "through a pattern of racketeering activity." In 18 U.S.C § 1961(5), a "pattern of racketeering activity" is defined as "at least two acts of racketeering activity." With regard to the conduct of the present defendants, "racketeering activity" is statutorily defined, 18 U.S.C. §1961(1), as (A) "any act . . . involving . . . bribery . . ., which is chargeable under State law and punishable by imprisonment for more than one year" and (B) "any act which is indictable under any of the following provisions of Title 18, United States Code:" mail fraud, 18 U.S.C. § 1341; interstate travel and the use of interstate instrumentalities with intent to commit bribery under state law, 18 U.S.C. § 1952.

The context facts show that, accepting the jury finding, R. J. L'Hoste & Company, Inc., and the defendants, its employees and officers, corruptly influenced a local governmental unit to give them no-bid "emergency work" contracts and corruptly performed these contracts. The local bribery in violation of state law, and the routine business use of the mails and of interstate travel in performing the work (and affording a Las Vegas trip to a corrupted official), apparently brings within the literal sweep of the federal racketeering statute conduct which many might regard as exemplifying garden variety local political corruption rather than federally cognizable interstate racketeering.

It is well to note, at this time, that no matter how isolated and minor two "racketeering" incidents might be in the context of the entire business conducted by the enterprise, the federal statute literally construed is violated, and the defendant's entire interest in the enterprise is subject to forfeiture under the statute. I emphasize this, because it is not readily conceivable to me that the Congress intended automatic forfeiture of an entire ownership in a business enterprise, however and whenever acquired (whether by inheritance or by legitimate business operations), irrespective of the magnitude of the "racketeering" conduct involved.[2]

For all we know, the overwhelming bulk of the business of the present contracting corporation was entirely legitimate in nature, and the corrupt contracts only a miniscule portion of it. Yet, according to the panel holding—and even if, instead of the extended conduct here shown, only two minor incidents of bribery have been shown over ten years—and no matter how minor and incidental may have been the accused's personal participation in the bribery of public officials by his employees,— the defendant L'Hoste's entire interest in the corporation is forfeited upon conviction of this crime. Private ownership of property is too funda-

2 Nor do I at this time consider the possibility that forfeiture, unevenly and disproportionately applied if mandated as automatically applicable, raises Eighth Amendment issues.

mental a value of our political and economic philosophy for me to believe that Congress ever intended that a lifetime's legitimate earnings or an inherited estate invested in a legitimate business enterprise should, to the prejudice of wife and child as well as the accused,[3] be automatically forfeited upon a conviction resulting from a federal prosecutor's decision to prosecute local bribery under the federal racketeering statute, or to utilize it instead of the (rather esoterically applied) mail-fraud statute as a basis for federal prosecution.

I must therefore respectfully dissent, with respect to whether forfeiture is mandatory upon conviction, from the denial of the defendant's application for an en banc rehearing.

3 As the trial court noted, the community property system of Louisiana vested in the wife an interest in property acquired during the marriage. Likewise, Louisiana's forced heirship provisions regard the property of an individual, although fully subject to his administration, as property which must descent to his children; it is, in a sense, the property of the family rather than of the individual himself.

APPENDIX "C"

[Court's Comments Upon Granting A New Trial]

THE COURT:

Gentlemen, I should like to address myself with complete candor to my consideration of these matters, the deliberation that I have given these matters pending before me, I think, has been the most difficult that I have encountered during my judicial career.

The decision which I have reached is a decision which I hope will foster justice for all, for the public, as well as for the Defendants. I do believe that I have an obligation to the public, as well as to the Defendants, to state why I have made the decisions that I have made. I will attempt to do that at this time.

In my comments, I don't mean to criticize anyone, except to attempt, candidly, to disclose the reasons for the decision that I am going to make.

First, let's talk about the letter. On May 9th, I received a letter from Mr. Cornelius Heusel, Director of the New Orleans Strike Force, which I have ordered filed in the record in the case, suggesting to the Court, in effect, that I should give the Defendant, Robert L'Hoste, a sentence substantially greater than that given by other sections of court to other individuals who had pled guilty, not to crimes to which Mr. L'Hoste and others were tried in this case, but to other unrelated crimes, as far as I have been able to tell, unrelated, except for the fact that they have been captured in the public's mind and the press and perhaps in the prosecutor's mind as part of what's come to be known as the Jefferson Parish Scandals.

I am sorry that the Government wrote me a letter. It did not affect me, would not affect me. I would comment to the prosecutor that I think it's a totally inappropriate thing for the Government to do in any case in this fashion.

First of all, it presupposes that a Judge is not aware of factors

stated in the letter which is a naive approach, that it presupposes that Judge is not aware of his obligations to the public. That, I think, is naive, at least, with regard to this Judge.

Further, it invites the Court to sentence this Defendant for something he did not do, as opposed to something for which he stood convicted.

It invites the Court to sentence him because he did not choose to cooperate with the Government and give testimony along lines that the Government would have thought appropriate to further its investigation.

For a Court to accept such an invitation, in my view, would be tantamount to erasing the significant line between the Judiciary and the Executive Branch of the Government, which line must be maintained if the Judiciary is to maintain its philosophical role as protector of individuals from Governmental tyranny.

A great deal has been made in the public's mind about corruption, that this Court believes, quite strongly, philosophical factors are equally as important, perhaps a great deal more important, one of those is protection of the individuals from thetyranny of the Government. When our Constitution was enacted, citizens were more concerned about Governmental tyranny than they were anything else. For that reason, among others, federal judges were given life tenure, so that they might have the independence not to depend upon their salary from the Government, but to exercise that independence. I feel that it's very important to maintain the separation. If the courts were to become handmaidens of prosecutors, if the courts were to impose sentences in order to further investigations, in my view, the integrity of the courts would be lost, not only in the eyes of judges who accepted such invitations, but also in the eyes of the public and justifiably so. I realize that that has happened in some instances around the country. I can assure you that I hope it will never happen to this Judge.

So, I do not intend, here, to accept the invitation under any circumstances to sentence this Defendant for something he did not do if the Defendant chooses to exercise his constitutional right to require that the Government prove his guilt behond a reasonable doubt, he's entitled to do so and should not be penalized for exercising that choice. Enough for the letter, at least, standing by itself.

I now would like to turn to the substantive grounds for the motion for a new trial.

First, let me state that I fully recognize that hindsight is twenty-twenty. I recognize that I may be open to the criticism for not having made certain decisions earlier. However, when asked to make the decisions at earlier time, the Court was confronted with isolated instances. With the benefit of hindsight, I am able, I think, to see more clearly the overall effect of certain things which I will describe, which, in my view, have brought in a serious question of the quality of justice, that has prevailed in this case.

The original indictment against the Defendants was so complicated, so verbose, so impossible of effective prosecution, that even the prosecutors recognized this fact and indicated to the Court when the Court was originally confronted with motions to dismiss, that it would come with a superseding indictment. Unfortunately, the superseding indictment did not arrive until just about a week before the trial and although valiant effort was made by all, because they wanted to maintain the trial setting, incuding the Defendants, the Government tried, insofar as possible, the Court told the Defendants to do the best they could, that the court would be in position to protect them if their rights were prejudiced. The fact is that no one really had the time to study and examine the indictment on which the trial was conducted and I include myself in that category. Indeed, it was not until the Court was laboring through almost all night sessions to try to confect a jury charge for such an indictment, the superseding indictment, that it

became apparent to the Court that one of the reasons it was so complex was that it was the Second Count, the so-called Racketeering Count had charged three separate crimes, a basis which allowed the dismissal right to the Defendants if they had known this before the beginning of trial. At that time, since they had not moved for dismissal, the Court was obligated to continue, hoping that it could do as good a job as possible to explain the indictment. The result was a jury charge which, although the Court labored with it greatly, it gave the jurors each a copy in writing, was overly complex, difficult to understand and perhaps, more significantly than anything else, difficult to defend against.

Let us consider the indictment, the two counts, first the conspiracy count which charged a plethora of various crimes, then these smae crimes for the most part, duplicated in the racketeering count, which enabled the Government to admit into evidence all sorts of activities and puts the Court and others, at this time, in a position of knowing not really what the jury chose to believe and what the jury chose not to believe.

Now, let me state candidly that I think there was evidence on which the jury might technically have found the elements as the Court instructed them with regard to each of the two counts and 'I want to say, too, that this was, I think, one of the most conscientious and able juries that I ever had the privilege of working with. It deliberated concientiously. So, I don't mean, in any way, to criti cize the jury's results. The fact is, that I think we, in the system of justice, gave them an impossible task.

I think, therefore, that although technically the Court might say there was evidence to support a conviction, I just don't believe that our system of justice is such that the Court of Appeals, who undoubtedly will be confronted with this case, the Defendant or, this Court, should be given the task to try to speculate as to which of the various goodies which the jury as presented they chose to select in order to support a conviction.

If these Defendants are to be convicted, then I see no reason why a simple indictment, divorced from the emotions and passions connected with the so-called scandals, a simple indictment charging them with crimes that they can defend against, which jurors and other courts and others can deal with effectively, cannot be confected and I believe if that happens, the quality of justice for all, public as well as the Defendants, will be enhanced greatly.

One of the other aspects of the indictment which made it very difficult was the fact that the Government sought to introduce evidence of other illegal acts, alleged illegal activities, such as the matters pertaining to the sundry streets project, although this was not an emergency work project and although mentioned in one of the overt acts of the indictment, the count of the indictment dealing with the conspiracy, it did not, technically, fall within the emergency work jobs which was the thrust of the conspiracy count. The Court was confronted with an objection during opening statement. At the time of Bench argument, the Court felt that the objection was a highly technical one, I subsequently believe that there was merit to the objection and that although in the overall picture of the evidence, the sundry street project may be said not to be that prejudicial, not to have affected the outcome, perhaps when cumulated with the vast amount of other broad general bad-type activity, I cannot say that it didn't prejudice the rights of the Defendants to a fair trial. this, again, is a trial defect brought about by the indictment, by the overly broad indictment and by the use of a racketeering statute. Though is is a prosecutor's decision, it certainly appears to the Court that the use of the Organized Crime Control Racketeering Statute was a totally inappropriate use of such statute in this case.

What has been the effect of all these actions? Well, one other thing before I get to it, the principal witnesses against the Defendants were persons who had received immunity from the particular crime charged in this case. Some of them, in this Court's opinion, exercised their conduct in such fashion as to grant serious doubt to

any credibility, to bring serious doubt as to whether they were not giving testimony in exchange for what they felt prosecutors wished to hear and I don't mean to imply misconduct on the part of prosecutors or, I don't mena, in any way, to imply that the prosecutors fostered this. But, the character of the individuals who testified, many of whom will forever remain totally unpunished for any allegedly illegal activity, much of which was much grosser than these Defendants are even charged with, has to cause the Court to be concerned about the system, to be concerned about a system where increasingly we find that people are indicted and tried on the basis of the testimony from those who have immunity, where so often in our criminal justice system the persons most culpable of traditional criminal conduct go unpunished because of immunity.

I recognize fully the philosophical basis for the use of these techniques by prosecutors. I simply suggest, as the courts have recognized, that such testimony has to be carefull examined.

So, what is the effect of all these things? Well, we have a situation where these Defendants and particularly the Defendant Robert J. L'Hoste, Jr., for whom the Government is still demanding the garrett, the rack and perhaps, crucifixion, has been subjected to microscopic examination in the present and in the eyes of the public and the court has been confronted with an unparalleled display of, on the one hand, empathy for Mr. L'Hoste and his Codefendants and on the other hand, vituperative cries of revenge. I have had many telephone calls to my office, many anonymous, suggesting the absolute obligation of the Court to impose the maximum sentence on these individuals. Sentencing also is scheduled for today and I've had many other individuals praising a lifetime of good works, many unsung, as these individuals state. The public patience is high, they, like the prosecutors, feel that great public harm has been done by public corruption which justify the techniques which I've just described.

On the other hand, the Court must balance the individuals whose convictions have been attained in the fashion which I've described.

In my view, after considering all of these factors, the best interest of justice for all would be solved or, served by the Court granting the motion for a new trial or, motions for a new trial by the Defendant Robert J. L'Hoste, R. J. L'Hoste and Company, Incorporated, Clarence Eugene Rogers, Marvin Cleo Cochran and George C.eckert Enterprises, Incorporated, so as to give all with the benefit of what we have learned, hopefully, the prosecutors as well as the defense, an opportunity to demonstrate the system of justice at work as it should.

In view of prevailing authorities, I must also grant that portion of the motion to reallot the case to another section of the court, the Court's rule that the Judge should not retry a criminal case a second time.

I tried to be as candid as I can with regard to the factors which have motivated my decision. I think the Defendants and the public are entitled to be aware.

I express no opinions by saying guilt or, innocence of any parties. My actions have been motiviated because of deep concern about the philosophical aspects of our system of justice and I hope and pray that it's been a wise decision for me.

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL ACTION
versus	*	NO. 77-587
(1) ROBERT J. L'HOSTE, (2) R. J. L'HOSTE & COMPANY, INC. (3) CLARENCE EUGENE ROGERS (4) MARVIN COCHRAN,	*	SECTION: "A"
	*	VIOLATION: 18 USC §371; 1962(c); and 2

* * * * * * * * * * * * * * * * * * * *

TWO-COUNT SUPERSEDING INDICTMENT FOR (1) A CONSPIRACY TO DEFRAUD, AND TO COMMIT OTHER CRIMINAL OFFENSES AGAINST THE UNITED STATES, INCLUDING THE USE OF THE MAILS IN FURTHERANCE OF SCHEME TO DEFRAUD, AND USE OF THE MAILS AND OTHER INTERSTATE FACILITIES FOR UNLAWFUL ACTIVITIES, TO PARTICIPATE, THROUGH A PATTERN OF RACKETEERING ACTIVITY, IN THE AFFAIRS OF ENTERPRISES, THE ACTIVITIES OF WHICH AFFECT INTERSTATE COMMERCE; AND, (2) A SUBSTANTIVE VIOLATION FOR SUCH PARTICIPATION IN THE AFFAIRS OF THOSE ENTERPRISES

* * *

The Grand Jury Charges:

COUNT 1

The Conspiracy Count

(18 U.S. Code, Section 371)

A. At all times material to this indictment:

(1) Defendant Robert J. L'Hoste was the President, a director and principal shareholder of defendant R. J. L'Hoste & Company, Inc., owning 633 ⅔ shares of a total of 1,000.

(2) Defendant R. J. L'Hoste & Company, Inc. was a Louisiana corporation domiciled in Jefferson Parish, Louisiana.

(3) Defendant Clarence Eugene Rogers was a civil engineer employed by defendant R. J. L'Hoste & Company, Inc. and after December 1973 became vice-president of defendant R. J. L'Hoste & Company, Inc.

(4) Defendant Marvin Cochran was employed by the defendant R. J. L'Hoste & Company, Inc. as construction foreman and superintendent.

(5) Defendant George C. Eckert Enterprises, Inc. was a Louisiana corporation wholly owned by George C. Eckert.

(6) Ray L. Condon, Jr. was the Director of the Department of Drainage and Sewerage for the Parish of Jefferson. In that official position, he was vested with the authority and responsibility for the planning, design, construction, maintainence, repair, operation and administration of the drainage and sanitary sewer system of the parish.

(7) Walter G. Frey was the chief engineer for the Department of Drainage and Sewerage for the Parish of Jefferson.

(8) Frederick J. Hoth, Sr. was employed by the firm of Albert Switzer & Associates, Inc., the consulting engineers for the Department of Drainage and Sewerage. He served as the firm's liason representative with Condon and Frey and other public officials in Jefferson Parish.

(9) Stallion Construction Company, Inc. was a Louisiana corporation owned by Condon, Frey and Hoth.

(10) New Crescent Enterprises, Inc. was a Louisiana corporation owned by Condon and Hoth.

(11) PIR, Inc. was a Louisiana corporation in which Condon, Frey and Hoth owned a total of 50% of the total outstanding shares.

(12) Crescent Rentals was a partnership owned by Condon and Hoth.

B. **The Conspiracy**

From on or about April 23, 1970 through December 1, 1977, in the Eastern District of Louisiana, and elsewhere, the five defendants, (1) Robert J. L'Hoste, (2) R. J. L'Hoste & Company, Inc., (3) Clarence Eugene Rogers, (4) Marvin Cochran, and (5) George C. Eckert Enterprises, Inc., did willfully, knowingly and unlawfully combine, conspire and agree with each other and with other co-conspirators some known and others unknown to the Grand Jury, to defraud the United States and to commit other criminal offenses against the United States.

(1) They conspired to defraud the United States, through the Secretary of the Treasury, Department of the Treasury, by intefer-

ing with, impeding, obstructing and defeating the lawful functions, operations and purposes of the Secretary, and the Department, in the administration of the State and Local Fiscal Assistance Act of 1972, sometime referred to as the Federal Revenue Sharing Act (31 U.S.Code, Sections 1221-1264), and the regulations adopted and promulgated (31 CFR, Part 51), and depriving the United States, through the Secretary, and the Department of Treasury, of (a) the right to have the federal revenue sharing program administered, conducted and accomplished honestly, fairly and properly, in compliance with all applicable laws and regulations, and free from dishonesty, favoritism, discrimination, deceit, bribery, kickbacks, conflicts of interest and other corrupt practices, and (b) the right to have the federal revenue sharing funds received by Jefferson Parish used only for actual, necessary, and duly authorized priority expenditures, in violation of 18 U.S. Code, Section 371.

(2) They conspired to defraud the Parish of Jefferson of public funds, by using and causing the United States mails to be used in furtherance of, and for the purpose of executing, and attempting to execute, a scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, prepresentations and promises, in violation of 18 U.S. Code, Section 1341.

(3) They conspired to travel and cause others to travel in interstate commerce, and to use and cause others to use telephone, mail and transportation facilities in interstate commerce between the State of Louisiana and other states, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, as defined in 18 U.S. Code, Section 1952(b), in violation of the laws of the State of Louisiana relating to bribery, as defined in Article 118(1) of the Louisiana Criminal Code (La. R.S. 14:118(1)), of public employees holding positions of public authority, including Ray L. Condon, Jr. and Walter G. Frey, in furtherance of their

scheme and artifice to defraud, in violation of 18 U.S. Code, Section 1952(a) and (b). And,

(4) They also conspired to be employed, associated with and to participate in the affairs of enterprises, as defined in 18 U.S. Code, Section 1961(4), through a pattern of racketeering activity, as defined in 18 U.S. Code, Section 1961(5), the activities of which affect interstate commerce, as defined in 18 U.S.Code, Section 10, and are prohibited by 18 U.S. Code, Section 1962(c), which unlawful acts involve, among others, many acts of public bribery, of public officials which are chargeable under LSA-RS 118(1) of the Louisiana Criminal Code, as defined in 18 U.S. Code, Section 1961(1)(A); acts relating to mail fraud, which are indictable under 18 U.S. Code, Section 1341; and, multiple acts relating to the use of interstate travel and interstate facilities, including the mail, to promote unlawful activity, which are chargeable under 18 U.S. Code, Section 1952, all in violation of 18 U.S. Code, Section 1962(c).

(C) **Ways and Means to Accomplish the Conspiracy**

(1) Defendant R. J. L'Hoste & Company, Inc., a constracting company doing underground construction work in Jefferson Parish, Louisiana, would obtain and keep public works contracts pertaining to the sanitary sewer system of Jefferson Parish with the aid and assistance of Condon, as Director of the Jefferson Department of Drainage and Sewerage; Frey, as chief enginerr of the Jefferson Department of Drainage and Sewerage; Hoth, as inspector for Albert J. Switzer & Associates, Inc., the consulting engineer for the Jefferson Parish Council; and others, and that in return the defendants would cause to be given to Condon, Frey and Hoth, and others, money and other considerations in the form of bribes through various means, as more fully described below.

(2) It was part of the conspiracy that Condon, as Director of the Department of Drainage and Sewerage of Jefferson Parish, would

recommend to the Jefferson Parish Council, as governing authority for the Parish, that defendant R. J .L'Hoste & Company, Inc. be granted lucrative cost-plus contracts for repairs to the sanitary sewer system on a so-called "emergency" basis, thus avoiding the necessity of cometitive bidding in compliance with the laws of the State of Louisiana. In addition, defendant Robert J. L'Hoste was to make necessary arrangements to assure Jefferson Parish Council approval for the "emergency" contracts. Additional fraudulent revenues were generated for defendant R. J. L'Hoste & Company, Inc., by officers and employees of defendant R. J. L'Hoste & Company, Inc. who would intentionally delay, obstruct, and impede the progress of the "emergency work" and charge to the Parish of Jefferson on a cost-plus basis; equipment at inflated costs; equipment not needed or inoperable; and unnecessary labor.

(3) It was further part of the conspiracy that in return for the aid and assistance of Condon, Fre and Hoth, the defendants would funnel money to Condon, Frey and Hoth by using companies, such as defendant George C. Eckert Enterprises, Inc., Stallion Construction Company, Inc., Crescent Rentals, and New Crescent Enterprises, Inc., for so-called "equipment rentals" to be used in the so-called "emergency works" projects, although the equipment was not needed, and was provided at inflated costs to be paid from Parish revenues and/or federal revenue sharing funds as is more specifically identified in overt acts 14-22 below.

(4) It was further part of the conspiracy that defendant R. J. L'Hoste and Company, Inc., through defendants Robert J. L'Hoste and Clarence Eugene Rogers would agree to use PIR, Inc. on the so-called "emergency work" projects, as a means of obtaining funds for Condon, Frey and Hoth, which payments of funds constituted violations of the laws of the State of Louisiana relating to public bribery.

(5) It was further part of the conspiracy that Condon, Frey and Hoth would aid and assist defendant R. J. L'Hoste & Company,

Inc., by providing to defendant Robert J. L'Hoste advance information concerning a contract known as the Sundry Streets Project of Jefferson Parish, thereby allowing defendant R. J. L'Hoste & Company, Inc. to submit a bid price lower than the bid price of its competitors. In return, defendant R. J. L'Hoste & Company, Inc., acting through its president, defendant Robert J. L'Hoste, defendants Clarence Eugene Rogers and Marvin Cochran, would and did kickback in the form of a bribe to Condon, Frey and Hoth $24,000 which was not due them.

(6) It was further part of the conspiracy that when a sanitary sewer lift station, with pumps, purchased from outside the State of Louisiana, was not needed on the Sundry Streets Project that R. J. L'Hoste & Company, Inc., acting through its officers and employees, would give this valuable equipment which was owned by the Parish of jefferson to Condon, Frey and Hoth. this lift station would then be used by Condon, Frey and Hoth on a private contract at a site located on Peters Road in Harvey, Louisiana. Defendant R. J. L'Hoste & Company, Inc., would provide to Condon, Frey and Hoth a complimentary bid on this private job knowing at the time that defendant R. J. L'Hoste & Company, Inc. was not to obtain the job.

(7) It was further part of the conspiracy that the defendant R. J. L'Hoste & Company, Inc., acting through defendants Robert J. L'Hoste and Clarence Eugene Rogers and others, would additionally, in return for the aid and assistance of Condon, Frey and Hoth, and others, make bribe payments in the form of:

(a) Vacation and hunting trips outside the State of Louisiana for Condon and Hoth;

(b) Provide labor and materials to help construct Condon's residence and to perform other work outside the State of Louisiana for the benefit of Condon;

(c) Purchase two parcels of land in the name of defendant Robert J. L'Hoste and execute a counter-letter in favor of Condon and

Hoth giving them free of charge a one-half interest in the property; and,

(d) Weekly cash payments, to a Parish inspector whose job included, among other things, inspecting and verifying the progress of work and the use of labor and equipment on public works jobs involving the sanitary sewer system of Jefferson Parish.

(8) It was further part of the conspiracy that for the purpose of executing the aforesaid scheme and artifice to defraud, the defendants did cause to be placed in an authorized depository for mail matter to be delivered by the Postal Service of the United States, certain material, including but not limited to, the following:

(a) Jefferson Parish Council Resolutions more fully identified in Overt Acts 4-13 below.

(b) Invoices of R. J. Marchand — Company, Inc., more fully described in Overt Act Number 31 below.

(c) Corresponsdence, invoices and checks mailed in connection with the Sundry Streets Project, as is more fully described in Overt Acts 28 and 29.

D. **Overt Acts in Furtherance of the Conspiracy**

The Grand Jury charges that the five defendants and their co-conspirators committed the following overt acts, among others, in furtherance of their conspiracy and to accomplish the objects and purposes thereof:

(1) From time to time during the period from on or about April 23, 1970, to on or about March 31, 1972, the defendant Robert J. L'Hoste, as President of defendant R. J. L'Hoste & Company, Inc., contrived and discussed with Frederick J. Hoth, Sr., a scheme to procure, on a selective, preferential and favorable basis, from the Jefferson Parish Council, through the Department of Drainage and Sewerage, lucrative public works projects involving so-called "emergency" repairs to parts of the sanitary sewer system on a cost-plus or "time and material" basis.

(2) Defendant Robert J. L'Hoste, as President of defendant R. J. L'Hoste & Company, Inc., proposed and agreed to make payments to Ray L. Condon, Jr., as Director, and Walter G. Frey, as Chief Engineer, of the Department of Drainage and Sewerage, and Frederick J. Hoth, Sr., of money, purportedly for "equipment rentals".

(3) Defendant Robert J. L'Hoste further proposed and agreed that these payments would be made by defendant R. J. L'Hoste & Company, Inc. to Condon, Frey and Hoth, through defendant George C. Eckert Enterprises, Inc., New Crescent Enterprises, Inc., Stallion Construction Company, Inc. PIR Corporation, and others, who would be used as conduits to disguise, conceal and coverup the financial interests of Condon, Frey and Hoth in these transactions and activities, and the payments of money to them by defendant R. J. L'Hoste & Company, Inc.

(4-13) That on or about the dates set forth below, the defendants, Robert J. L'Hoste and R. J. L'Hoste & Company, Inc., in collusin with Ray L. Condon, Jr., as Director of the Department of Drainage and Sewerage, and Walter G. Frey, as Chief Engineer for the Department, and others, caused the Jefferson Parish Council to adopt Resolutions, the numbers of which are set forth below, declaring that there were "emergency" conditions involving problems or damages to the Parish sewer system at sepcific locations; and, the repair work project was awarded to defendant R. J. L'Hoste & Company, Inc., without a description of, or plans and specifications for the proposed work, and without advertisement or notice to other contractors, and without competitive bids, on an "emergency" cost-plus basis without any estimate, budget or limit as to the cost of, or the time to complete, the proposed work.

	DATE	PARISH COUNCIL RESOLUTION	LOCATION OF PROJECT
(4)	April 23, 1970	16157	Carrollton Avenue
(5)	April 22, 1971	18102	Rosewood & Stroelitz Streets (East Bank)

(6)	February 17, 1972	19596	Bore St. and Ridgelake Drive (East Bank)
(7)	June 1, 1972	20140	48th St. and Ridgelake Drive to Causeway Blvd. (East Bank)
(8)	September 28, 1972	20657	Ames Blvd. between August Lane and Acres Road (West Bank)
(9)	May 10, 1973	21861	Bellevue Subdivision on Labarre Road between Southern Railroad tracks and Airline Highway (East Bank)
(10)	June 21, 1973	22138	Deerfield and Emerson Streets (West Bank)
(11)	September 3, 1973	22485	400 Block of Bellemeade (West Bank)
(12)	February 7, 1974	23244	North Service Road and the West Bank Expressway from Silverlilly Lane to Cohen Street (West Bank)
(13)	January 15, 1976	26985	Green Briar-Golden Heights Subdivision System (West Bank)

(14-22) Between the dates set forth below, the defendants, Robert J. L'Hoste, R. J. L'Hoste & Company, Inc., and Clarence Eugene Rogers, caused to be submitted to the Jefferson Parish Finance Department certificates for the actual cost of labor, mat-

erials and equipment allegedly used in the sewer repair work allegedly done by defendant R. J. L'Hoste & Company, Inc., on the projects set forth in (4-13) above, plus 15 % for overhead and profit; and, defendant R. J. L'Hoste & Company, Inc. received from the Jefferson Parish Finance Department payment in amounts set forth below which included sums paid out of federal revenue sharing funds.

	DATES	NUMBER OF CERTIFICATES	TOTAL REQUIRED FOR PROJECT	AMOUNT AND PERCENTAGE OF FEDERAL REVENUE SHARING FUNDS
(14)	June 1, 1971 to January 17, 1972	12	$633, 240.48	$ 82,231.60 (12,98 %)
(15)	March 22, 1972 to September 7, 1972	12	$575, 369,02	$523,792.31 (91.03 %)
(16)	June 20, 1972 to February 1, 1973	12	$397,246.87	$211,790.17 (53.3 %)
(17)	November 9, 1972 to July 12, 1973	12	$367,961.87	$116,872.32 (31.76 %)
(18)	July 11, 1973 to May 28, 1974	19	$661,038.04	$661,038.04 (100 %)
(19)	July 11, 1973, to May 28, 1974	12	$303,455.22	$303,455.22 (100 %)
(20)	October 24, 1973 to May 28, 1974	8	$286,621.25	$286,621.25 (100 %)
(21)	March 12, 1974 to july 2, 1975	19	$769, 616.02	$747,737.35 (97.16 %)
(22)	February 4, 1976	21	$840,281.36	None

(23) According to the records of defendant R. J. L'Hoste & Company, Inc., the company realized from these "emergency cost-plus projects at least $892,501.19 profit.

(24) During the period from April 12, 1972 to March 7, 1975, defendant R. J. L'Hoste & Company, Inc., made approximately 26 payments of money totaling approximately $215,453.50 to defendant George C. Eckert Enterprises. Inc.

(25) During the period from on or about April 12, 1972 to on or about March 7, 1975, defendant George C. Eckert Enterprises, Inc. issued to Stallion Construction Company, Inc., numerous checks totaling approximately $165,943.16.

(26) During the period of time from August 5, 1974 to June 3, 1976, defendant R. J. L'Hoste & Company, Inc. made approximately 16 payments of money totaling approximately $86,356.94 to New Crescent Enterprises, Inc.

(27) During the period from on or about January 14, 1972 to on or about June 3, 1976, defendant R. J. L'Hoste & Company, Inc. made payments of money totaling approximately $316,828.99, through Stallion Construction Company, Inc., defendant George C. Eckert Enterprises, Inc., and New Crescent Enterprises, Inc. and others purportedly for the rental of the equipment.

(28) During the period from on or about November 16, 1974 to on or about November 13, 1975, defendant R. J. L'Hoste & Company, Inc. submitted twelve statements for amounts allegedly due on the Sundry Streets Project, that was awarded on or about October 11, 1973 by the Jefferson Parish Council in accordance with Resolution No. 22646 to defendant R. J. L'Hoste & Company, Inc., as the lowest bidder, and received from the Jefferson Parish Finance Department eleven checks totaling $880,039.40, which included, among other things, payment for four lift stations with pumps that were purchased on or about March 31, 1975 by

defendant R. J. L'Hoste & Company, Inc. from Parson & Sanderson, Inc. Approximately $237,000 of the total $880,039.40 was made up of federal revenue sharing funds.

(29) On or about January 4, 1977, defendant R. J. L'Hoste & Company, Inc. gave a lift station and pumps (Serial No. 10083-4) to Condon, Frey and Hoth, who caused the lift station to be installed by G & B Construction Company, Inc., as a sub-contractor of Giroir Construction Co., Inc., for the Intracoastal Terminal Company, Inc. and J Ray McDermott Company, Inc. at the location of their adjoining plants on Peters Road in Harvey, Louisiana.

(30) During the period of time from January 1, 1971 to March 31, 1977, the defendants, Robert J. L'Hoste, R. J. L'Hoste & Company, Inc., Clarence Eugene Rogers and Marvin Cochran, made payments of money, usually but not always in the form of political campaign contributions to local and state public officials and candidates for public office.

(31) During the period from on or about August 24, 1972 to on or about December 8, 1972, defendants R. J. L'Hoste & Company, Inc. made eight purchases from R. J. Marchand & Company, Inc. of household appliances and fixtures at a cost of $2,826.07 for installation in the home of Ray I. Condon, Jr., and defendants Robert J. L'Hoste and Clarence Eugene Rogers later caused R. J. Marchand & Company, Inc. to falsify the original invoices.

All in violation of 18 U.S. Code, Section 371.

* * *

Count 2
The Substantive Violation

(18 U.S. Code, Section 1962(c)
and Section 2(a) and (b))

Participation, Through a Pattern of Racketeering Activity, in the Affairs of Enterprises, the activites of Which Affect Interstate Commerce

(A) The allegations of fact in Count 1 hereof are incorporated herein by reference as if set forth at length.

(B) From on or about April 23, 1970, through December 1, 1977, the date of the original indictment, each and all of the defendants, Robert J. L'Hoste, R. J. L'Hoste & Company, Inc., Clarence Eugene Rogers, Marvin Cochran, and George C. Eckert Enterprises, Inc., being employees or associates with R. J. L'Hoste & Company, Inc., George C. Eckert Enterprises, Inc., and the association in fact of all named defendants, each constituting an enterprise, as defined in 18 U.S. Code, Section 1961(4), which enterprises were engaged in, and the activities of which affected, interstate commerce, did unlawfully and knowingly conduct and participate, directly and indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity, as defined in 18 U.S. Code, Section 1961(1) and (5).

(C) The racketeering activity, that each and all of the defendants knowingly, willfully and unlawfully conducted, and engaged and participated in, (1) included each and all of the acts involving public bribery, by the defendants, of Ray L. Condon, Jr., as Director of the Department of Drainage and Sewerage of the Parish of Jefferson, and Walter G. Frey, as Chief Engineer of the Department, and other public officials and employees holding positions of public authority in Jefferson Parish, each and all of which acts are chargeable under Article 118(1) of the Louisiana Criminal Code (R.S. 14:118(1)) and punishable by imprisonment for more than one year; (2) acts which are indictable under 18 U.S. Code, Section 1341, relating to mail fraud; and (3) acts which are indictable under 18 U.S. Code, Section 1952 relating to interstate travel and use of interstate facilities including the United States mails,wit with the intent to promote, manage, establish, carry on, or facili-

tate the promotion, management, establishment or carrying on, of unlawful activity as defined in 18 U.S. Code, Section 1952(a)(3) and (b)(2), involving numerous acts of public bribery by the defendants which are in violation of Article 118(1) of the Louisiana Criminal Code (R.S. 14:118(1)).

All in violation of 18 U.S. Code, Section 1962(c) and Section 2.

* * *

(D) The Grand Jury further avers that the offense charged in this count of the indictment may result in criminal forfeitures, in accordance with 18 U.S. Code, Section 1963, and that each and all the defendants are subject to the forfeiture of their entire right, title and interest in and to any and all of the tangible and intangible property, money, stock, assets, accounts receivable, claims and other rights that was acquired or maintained by each and all of them in each and all of the enterprises named as defendants herein in violation of 18 U.S. Code, Section 1962, as described in the allegations in other parts of this indictment which are incorporated herein as if set forth at length.

A TRUE BILL:

_____

FOREMAN

/s/

_____

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New Orleans, Louisiana
June 6, 1978

Supreme Court, U. S.
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No. 79-1898

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT J. L'HOSTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the indictment was sufficiently plain, concise, and definite to satisfy the requirements of Rule 7(c)(1) of the Federal Rules of Criminal Procedure.

2. Whether the trial court committed plain error when it refused to instruct the jury on the distinction between bribery and goodwill expenditures.

3. Whether a district court has discretion to deny forfeiture under the racketeering enterprise statute, 18 U.S.C. 1963.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 609 F. 2d 796.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1980. A petition for rehearing en banc was denied on April 8, 1980. The petition for a writ of certiorari was filed on May 24, 1980, and is therefore out of time under former Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiracy to violate various federal and state laws (18 U.S.C. 371) and racketeering, in violation of 18 U.S.C. 1962(c). Petitioner Robert J. L'Hoste was sentenced to four years' imprisonment and fined a total of $35,000, but the district court declined to invoke the forfeiture provisions of the RICO statute against him. Petitioner R.J. L'Hoste & Company, Inc. was fined $35,000. Petitioner Clarence E. Rogers was fined $2,500 and placed on probation. Petitioner Marvin Cochran was also placed on probation. Petitioners' convictions were affirmed on appeal. In addition, acting upon a mandamus petition filed by the government, the court of appeals ruled that the district court should order the forfeiture of Robert L'Hoste's interest in his company.

The complex procedural history of this case is summarized in the court of appeals' thorough opinion (Pet. App. 5a-6a). Here it is sufficient to note that, at the end of their third jury trial, petitioners were convicted of participating in what the court below aptly characterized

as "a labyrinthine plot of public bribery" involving the award of sewer contracts in Jefferson Parish, Louisiana (Pet. App. 6a). The evidence, as summarized by the court of appeals (*id.* at 6a-7a), showed that between 1970 and 1977, the parish awarded sewer contracts on an emergency "no-bid, cost-plus" basis, on the recommendation of Ray Condon, the director of its Department of Sewerage and Drainage. The contracts, financed in large part with federal funds, would have been performed at a substantially lower cost had they been put out for competitive bidding. L'Hoste & Company received 77% of the "emergency" work, totalling over $5 million, through a scheme of kickbacks to Condon and others. Contract costs were padded with excessive payrolls and machinery rentals. Job costs, and consequently L'Hoste & Company's profits, were further inflated when L'Hoste, without good reason, directed that the work be delayed. One job that normally should have taken a month took nearly eight months. The dilatory tactics included working at a slow pace or simply loafing, digging up good pipe, making unnecessary repairs, and stopping up water pipes. While on L'Hoste & Company's payroll, employees also did construction and landscaping work at Condon's residences. Some of the equipment charged off to the job was run merely to make noise; some was run only when an inspector was present; and some was inoperable. The inflated equipment rentals were channeled to Condon, Frederick Hoth (consulting engineer for the Department of Drainage and Sewerage), and others through conduit rental companies in which they held interests (Pet. App. 6a-7a).

The evidence showed that petitioners' bribes took many forms besides excessive payments for unnecessary equipment rented from companies owned by parish officials. There were also gifts of land, hunting trips, vacations to

places such as Acapulco and Hawaii, and many campaign contributions in excess of $10,000 (Pet. App. 14a).

The defense attempted to show that the responsibility for the delays and the goldbricking rested with Carl Calamia, who had been general superintendent of L'Hoste & Company before he was fired (Pet. App. 7a). The defense also vigorously attacked the credibility of the government's most damaging witnesses, Calamia and Hoth, who both testified under grants of immunity (Pet. App. 14a). Finally, petitioners claimed that the vacation trips they admitted giving to parish officials and inspectors were mere "goodwill" expenditures that could not be considered bribes under Louisiana law. The balance of the alleged bribes were claimed to be legitimate campaign contributions (*ibid.*).

ARGUMENT

1. Petitioners contend (Pet. 8-11) that the indictment did not comport with the requirements of Rule 7(c)(1), Fed. R. Crim. P. This claim is frivolous. The government modified the indictment twice in an effort to meet petitioners' objections to its form (Pet. App. 53a-67a). It is "a plain, concise, and definite written statement of the essential facts constituting the offense charged" within the meaning of Rule 7(c)(1). As the court of appeals stated (Pet. App. 8a-9a):

> [I]ts length and complexity were necessitated * * * by the nature of the crimes charged. Both counts alleged violations of Louisiana and federal law spanning more than seven-and-one-half years and involving more than a dozen different parties. Due to the intricate interrelationships among the many parties within this extended time frame, a lengthy indictment was required to set forth the elements of the offenses charged, to give the defendants adequate notice of

the charges, and to provide a basis for a former jeopardy plea in any subsequent criminal proceedings stemming from the defendants' conduct in this case.

2. Petitioners next contend (Pet. 12-14) that the trial court erred when it declined to instruct the jury on the distinction between "goodwill" expenditures and bribery. This claim has no merit. We rely upon the exhaustive treatment of the issue in the opinion of the court of appeals (Pet. App. 14a-24a), which specifically explains (*id.* at 18a-21a) why petitioners are incorrect in arguing that the decision here conflicts with *United States* v. *Arthur*, 544 F. 2d 730 (4th Cir. 1976).

3. Petitioners' final claim (Pet. 14-17) is that the court of appeals erred in ruling that the district court had no discretion to deny forfeiture of petitioner Robert J. L'Hoste's two-thirds stock ownership in L'Hoste & Company after the jury determined that his ownership interest was subject to forfeiture under 18 U.S.C. 1963(a). The court of appeals' decision is correct (Pet. App. 26a-36a); it is, moreover, the first decision to address this question. In the absence of a conflict there is no reason for this Court to grant review here.[1]

---

[1]Petitioner concedes (Pet. 14) that the question presented here "has not been decided by any other appellate court," but he then suggests (Pet. 16) that the court of appeals' decision conflicts with *United States* v. *Huber*, 603 F. 2d 387 (2d Cir. 1979), cert. denied, No. 79-896 (Mar. 17, 1980). *Huber* merely stated in dictum that a district court has "a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provisions." *Id.* at 397. The district court's order in *Huber* had provided that the defendant could redeem and repossess himself of the forfeited corporate entities upon payment of $100,000 to the Attorney General (*ibid.*), and the government had not opposed that provision of the order.

Petitioners provide no answer to the court of appeals' careful and compelling analysis of this issue.[2] They offer only two arguments in support of their position. First, they rely (Pet. 15) on Judge Tate's statement (Pet. App. 42a) in his dissent from the court of appeals' denial of rehearing en banc that he could not believe that Congress intended "to leave to a prosecutor alone the determination to achieve forfeiture of an accused['s] * * * property," particularly since the racketeering acts might be isolated incidents in the conduct of an otherwise legitimate business. Second, petitioners argue (Pet. 16-17), echoing Judge Tate (Pet. App. 41a-42a), that a district judge has discretion to suspend the forfeiture under the provisions of the federal Probation Act, 18 U.S.C. 3651-3656. Neither of these arguments is convincing.

Congress has not placed unwarranted power in the hands of the prosecutor with respect to forfeitures. The prosecutor's power to obtain a forfeiture of property used in a racketeering enterprise by charging and proving a violation of the racketeering statute differs in no significant respect from his power to obtain particular penalties under any other type of mandatory sentencing statute (see, *e.g.*, 21 U.S.C. 841(b)) or his power to subject a defendant to the possibility of harsher punishment by charging him under one statute rather than another for conduct that might be charged under either one. This Court has recognized that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979). Nor does it matter that, in choosing to prosecute an individual under one statute rather than another that might also apply, the prosecutor may be "influenced by the penalties available upon conviction." *Id.* at 125.

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[2]We do not repeat the court of appeals' analysis here, but we rely upon it.

Petitioners' suggestion (Pet. 15) that the nature of the forfeiture penalty makes prosecutorial discretion more problematic because it is an exception to the prohibition in 18 U.S.C. 3563 against "forfeiture of estate" is erroneous. The forfeiture authorized by 18 U.S.C. 1963 is, in contrast to the traditional common law forfeiture of estate, "extremely narrow" (*United States* v. *Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), applying only to property with a specified nexus to the racketeering enterprise through which a defendant has been found to have committed violations of the racketeering statute. And Congress has provided a safeguard in Fed. R. Crim. P. 31(e), requiring that "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."

In any event, administrative controls exist to deal with any potential problem of abuse of the racketeering statute by overzealous local prosecutors. No RICO prosecution may be initiated without the prior approval of the Criminal Division of the Department of Justice. Moreover, Congress has provided an additional safeguard in 18 U.S.C. 1963(c), which states in pertinent part:

> All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeiture for violation of the customs laws * * * shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof.* * *

This provision has so far not been interpreted by the courts or, indeed, by government regulation. A similar provision in 18 U.S.C. 1955(d)[3] has, however, resulted in the promulgation of regulations that place the responsibility for passing upon petitions for remission or mitigation (after a trial determination of forfeitability) on senior officials within the Criminal Division of the Department of Justice, including the Assistant Attorney General. See 28 C.F.R. 9a.7 and 9.3. Thus, assuming that a similar procedure will govern petitions for remission or mitigation under 18 U.S.C. 1963(c), the ultimate decision whether to forfeit property and the extent of the forfeiture will reside with responsible officials of the Department of Justice, not with the local prosecutor.

Finally, if a jury believes that a forfeiture sought is unduly harsh, it is free to exercise its traditional nullification power in connection with its special verdict determining the extent of the interest or property subject to forfeiture; and the courts have made it clear that they would not hesitate to invalidate forfeitures which they deemed so disproportionate to the seriousness of the criminal activity involved as to violate the Eighth Amendment. *United States* v. *Marubeni America Corp.*, 611 F. 2d 763, 769 n.12 (9th Cir. 1980); *United States* v. *Huber*, 603 F. 2d 387, 397 (2d Cir. 1979), cert. denied, No. 79-896 (Mar. 17, 1980).

Petitioners' reliance (Pet. 16-17) upon the federal Probation Act provision respecting suspension of sentence, 18 U.S.C. 3651, is equally misplaced. Section 3651 repeatedly speaks in terms of the suspension of fines

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[3]18 U.S.C. 1955, the federal gambling statute, was enacted as Title VIII of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 937. The RICO statute originated as Title IX of the same Act.

or imprisonment. As to forfeiture, however, Section 3651 is silent. Had Congress wished to give district courts the power to suspend forfeiture penalties, it could have amended the terms of Section 3651 so to provide, just as it made several changes in the Federal Rules of Criminal Procedure to accommodate the new criminal forfeiture provisions of the RICO statute and 21 U.S.C. 848. See Fed. R. Crim. P. 7(c)(2), 31(e), and 32(b)(2).

Moreover, as the court of appeals stated (Pet. App. 36a), "the rationale that motivated Congress to reinstitute the [criminal] forfeiture penalty indicates that it was enacted to serve a purpose other than that of a criminal sentence involving a fine or imprisonment." Although forfeiture is technically a penalty, its purpose is remedial, like that of the civil remedy provisions of the RICO statute, 18 U.S.C. 1964-1968. It was designed to deprive criminal organizations "of their economic base so that they could not easily continue illegal activities" (Pet. App. 36a). Having already made the policy decision to attack organized crime through its economic base, Congress had no reason to give district judges the power to interfere with such a policy. The Congress that enacted the RICO statute was, in fact, exasperated by the lenient sentences often meted out to the most important organized crime figures. For that reason it also passed the Dangerous Special Offender Sentencing statute (18 U.S.C. 3575-3578) as Title X of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 948. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 85-87 (1969). The same Congress shortly thereafter passed the Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1265, which drastically limited district judges' sentencing discretion with regard to organized crime management personnel. See 21 U.S.C. 848(a) and (c) (Continuing Criminal Enterprise) and 21 U.S.C. 849 (Dangerous Special Drug Offender

Sentencing). Thus, "Congress' failure specifically to authorize [the judicial act at issue] was not a slip of the legislative pen, nor the result of inartful draftsmanship, but was a conscious and not irrational legislative choice." *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), slip op. 18-19. All of these considerations lend support to the court of appeals' analysis and to its conclusion that Congress intended the forfeiture provisions of the RICO statute to be mandatory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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